Supreme Court, U.S.
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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCIS J. DASHNAW,

Petitioner,

v.

U.S. Department of Transportation, an Executive Department of the Federal Government; FREDERICA PEÑA, Secretary of Transportation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether denial of a part of the requested make-whole relief as being "speculative" is consistent with the standards set by the Supreme Court.

2. Whether the Court of Appeals applied an appropriate and consistent standard and adhered to the guidance given by the Supreme Court in reversing the District Court's ruling on constructive discharge.

3. Whether it was error for Court of Appeals Panel to fail to consider the arguments on retaliatory conduct on constructive discharge claim.

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FRANCIS J. DASHNAW,

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Francis J. Dashnaw, on his own behalf, hereby petitions this Court for a writ of certiorari to the United Stated Court of Appeals for the District of Columbia Circuit. Neither his attorney of record, who does not practice before the Supreme Court, nor any other attorney helped prepare this petition.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears as Appendix A, bearing case

numbers 92-5256 & 92-5274, and is reported at *Dashnaw v. Peña*, 12 F.3d 1112 (D.C. Cir. 1994). The memoranda and order appealed to the Court of Appeals, Appendices B, C, and D, are unreported. The Petition for Rehearing and hearing en banc appears as Appendix E. The orders denying an en banc hearing and rejecting a rehearing appear as Appendix F. Selected parts of Cross-Appellant/Appellee's briefs appear as Appendix G and Appendix H. References to J. A. for Court of Appeals are deleted.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the District of Columbia Circuit on January 7, 1994 and March 29, 1994. The jurisdiction of this Court is invoked under Title 28 of the United States Code § 1254(1).

STATUTORY PROVISIONS INVOLVED

These Code Sections deal with the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633a et seq. and the rights of a federal employee and agency conduct relating to age discrimination, retaliation, constructive discharge and remedy.

STATEMENT OF THE CASE

The following is a brief chronology of pertinent evidence from the extensive record. The qualifications and performance of the petitioner are not at issue. His performance was always satisfactory or above. See App. B at 16a, 31a. His qualifications and activities were highly regarded and above average. See App. B at 28a-29a, 30a-31a. Some evidence presented at trial bears on the discharge of the plaintiff after trial.

Petitioner accepted a GS-14/1 engineering position with the Maritime Adminis-

tration in September 1967 at a substantial reduction in income from an executive level engineering manager position with Chrysler Corporation with the understanding that he would be promoted to a GS-15 grade, for which he had been qualified, as soon as the new R&D program got underway. See App. B at 27a; App. C at 81a. A memorandum to that effect was filed by the hiring official. See App. B at 27a-28a. After that R&D program got underway, younger employees with much less education and training and experience were promoted past the petitioner as exceptions without competition or by other unfair practices. See App. B at 13a, 23a, 26a, 32a, 35a, 38a-39a; App. C at 77a; App. H at 138a. Friends of the third level supervisor were hired at higher grades and pay steps using rigged selection procedures depriving the petitioner of opportunities. See App. B at 19a 34a 38a,

42a, 48a. Petitioner made numerous attempts to be promoted. App. C at 77a.

Some research projects developed by the petitioner were forcibly transferred from him, with predictable humiliation, to younger much less experienced personnel who were at higher grade and pay. One such person had been placed in the position that had been basically that of the petitioner. See Tr.; App. B at 49a, 50a-51a, 58a. One such project forcibly transferred was a very large project in which petitioner's name as the technical representative was erased from the contract documentation and replaced by the name of the younger man. This was done after the petitioner had done all of the precontract work and at the last stage of contract approval without the prior knowledge of the petitioner. See Tr.; App. B at 58a, 56a; App. C at 67a; App. E at 97a; App. G at 121a; App. H at 133a.

False promises of promotion were made repeatedly to petitioner with requests for him to prepare a proposed program (Tr.; Exh.). Younger personnel did not have to prepare such a program to get promoted past the petitioner. App. B at 28a, 32a.

The harrassing note (Tr.; Exh.) from Mr. Z. Levine is an early example of harassment. See also App. C at 39a.

The petitioner tried to leave the office including his written request to the Office of Personnel to assist him in leaving the organization which was unanswered (Tr.; Exh.; App. G at 123a).

In 1975, a humiliating and upsetting untrue claim was made in front of others by petitioner's third level supervisor who stated that petitioner did not accept a certain individual as a "supervisor" which petitioner was promptly able to prove false (Tr.) with the aid of that "supervisor,"

who was not a supervisor (Tr.). At that time, petitioner made a verbal claim to that third level supervisor that he felt that he was being discriminated against. He was immediately physically and verbally assaulted by that supervisor. Later at trial, that event was described by the petitioner when, after he described how he was being pounded on in his heart area, he reached an emotional limit and could not complete the rest of the description of the assault. See Tr.; App. G at 119a.

Petitioner was then force transferred and layered under a nonsupervisor of lesser age, experience and training with attendant loss of rank and opportunities and predictable humiliation which left him vulnerable to loss of job in the then advertised upcoming desk audit. App. B at 25a-26a; App. E at 95a, 96a; App. G at 111a, 120a. Petitioner filed an administrative com-

plaint of discrimination on that forced transfer in 1975 which also included claims of non-promotion and possible loss of job against that third level supervisor. App. B at 25a-26a. A later filing to the court shows that these actions are surprisingly similar to the "layering technique" described in a Congressional report (Exh.) which recognized that "if they did not resign ... this 'layering technique,' followed by a reduction in force after a respectable waiting period, was the technique used ...". App. E at 96a; App. G at 120a; Exh.. The agency's proffered reason for the forced transfer "to save jobs" was rejected by the District Court. App. B at 66a. Petitioner was forced to remain in that humiliating position until his discharge seven years later.

The agency viewed itself as having an "age problem" and acted to drop the average

age by 20 years in 5 years (by flushing out older personnel) which was considered an achievement by both the agency and Dep't of Commerce. App. B at 24a, 26a, 33a-36a, 98a; App. H at 138a.

Petitioner continued to try to leave that office without success. He filed three more administrative complaints of discrimination in 1975-76 based on his nonselection in four advertised positions outside that office including retaliation claims. App. B at 26a-27a; Tr.; Exh.'s.

In 1977, petitioner filed a complaint in District Court.

Petitioner was exposed to further offensive and humiliating actions and conditions. These included degrading remarks such as Mr. Pitkin's statement to petitioner of his policy of "letting people that he didn't like sit at an empty desk with nothing to do and that the organiza-

tion could absorb it" (Decl.); and, actions such as his dropping a dirty penny into plaintiff's cup of coffee and saying "This is what I think of you." App. G at 119a; Decl.. At least one employee was told not to talk to the petitioner (Tr.).

Petitioner was allocated less travel funds to monitor his contracts (Tr.; Exh.) and forced to discontinue his representation of the agency on technical panels of professional societies (App. E at 98a; App. G at 122a; Tr.).

One of the selecting officials/rater slandered the petitioner by making the false statment under oath that "Based on Mr. Dashnaw's actions to date, applying for every GS-15 job and filing a discrimination complaint when he does not get selected, I would have some doubts about his stability. I would therefore doubt his ability to deal with people in sensitive situations, and

this, too, would be cause for not selecting him." App. G at 120a; Tr..

An alarming threat to be worked over with a baseball bat was made to petitioner before trial. Petitioner reported that incident in writing (Exh.) to the Office of Security; unanswered. App. G at 120a.

The nine day trial commenced on April 21, 1980.

A long time EEO counselor testified that agency supervision made working conditions intolerable for older employees. App. G at 110a-111a; Tr.. Several others also testified to the mistreatment of older personnel. App. G at 123a. While conditions were made very attractive for younger personnel. App. B at 40a-41a; Tr..

Following trial, the agency gave the plaintiff even less funding support, and significantly less than that provided to his co-workers (Tr.; Exh.'s). The plain-

tiff, and only the plaintiff, was not allocated any funding support by the agency for any Fiscal Year 83 research projects (planned late CY 81 to beginning of CY 1982) which left the plaintiff with no future work to do. App. E at 95a; App. G at 112a; App. H at 133a. There was no response to the plaintiff's repeated requests for new assignments. App. E at 95a; App. G at 122a; Decl.. Unlike all other technical personnel, plaintiff was being left to sit at an empty desk with little or nothing to do (Decl.), being denied assignments or reassignment, which, in the mind of the petitioner, is particularly abhorrent and degrading to a professional and is the ultimate in loss of rank. App. G at 121a.

Inappropriate questioning of plaintiff on the status of his case was made on nearly a daily basis. App. E at 98a.

At the end of April 1982, the agency

abolished the plaintiff's position, and only his position, claiming a business necessity. App. G at 108a. The agency offered the petitioner "another position" as required because he was a veteran; however, the "offer" was not a valid offer because it had no identified title, job description, job number, or other identifier. Decl.'s. The plaintiff refused that one and only offer and was not afforded an opportunity to search any register for a position. Plaintiff actively sought other employment within and outside of government. App. G at 108a; Decl's; Exh.'s.

Following trial in 1980, defendant continued to humiliate the plaintiff by keeping plaintiff "layered" under a younger less experienced non-supervisory and, as petitioner submits, the agency showed bad faith in never correcting the complained of forced transfer 7 years earlier despite the

evidence at trial. App. E at95a; App.G at 111. It is reasonably to conclude that there was no likelihood for his advancement or correction of his status (App. H at 139-140) and that that environment was intolerable in a discriminatory way. He was not eligible to retire; hence, he was forced to choose between accepting either involuntary termination or the status quo of sitting at an empty desk -- no other viable option was offered. Plaintiff's stated belief that it would be destructive to him to be isolated in a room without windows with no work to do was reasonable. App. G at 124a; Decl..

The record shows that these career ending circumstances followed many years of discriminatory and/or retaliatory denial of promotion and mistreatment of the petitioner (and other older personnel), despite the agreement of grade change made prior to his hire in 1967, and promises of promotion

thereafter and his numerous and various attempts to be promoted. That, with the other factors that contributed to the intolerable and humiliating conditions, and the knowledge from the trial that the agency treated older personnel adversely (Tr.; App B at 32a-73a) and was a proven discriminator (App. E at 103a; App. G at 114a), and that Mr. Schindler, also a veteran, and his attorney had a three year fight on the abolishment of his position (App. G at 123a; Tr.), and in the absence of a decision by the court, set the stage for plaintiff's termination. Plaintiff was involuntarily terminated from employment on June 29, 1982 before the issuance of any decision by District Court. No RIF plan, or authority for it, was ever produced to show any objective criteria by which to determine which job(s) would be eliminated and for what reason(s). It was later learned

that plaintiff was the only person terminated in 1982. App. E at 95a; App. G at 108a, 112a, 113a. He remained on the job until his discharge while urging the court for a decision; expected daily. He applied for discontinued service retirement being unable to get another position in government. Decl.. The District Court was notified of the change in status of the plaintiff and urged for a decision. App. A at a4. He repeatedly urged the court for a decision before and thereafter (Docket sheet). The plaintiff never gave up any rights to his claims on any of the positions that he was denied.

New personnel were observed in the offices by the plaintiff shortly after his discharge. Decl.; App. G at 116a. Another older professional was the only individual involuntarily terminated in CY 1983 as part of the continuing pattern. App. G at 118a.

District Court filed Memorandum in 1985 in favor of the plaintiff, then vacated it to consider motions and to give the parties a chance to settle. The plaintiff then reminded the court that he had been discharged. District Court filed Memorandum on April 4, 1988 which found for the plaintiff, but omitted the constructive discharge issue. App. B.

The plaintiff filed required motion for relief which included relief for the discharge. Many filings and exhibits ensued on the issues of constructive discharge and tracking of the promotion history.

The agency claimed that the plaintiff was RIF'd because of budget reductions and that several personnel were effected. Decl.'s. The plaintiff showed that the reason proffered for abolishing his position was pretextual and that the plaintiff was actually the only person discharged in

1982 (App. G at 116a-118a; Decl's).

As part of his request for make whole relief, the plaintiff requested the tracking of the promotion/benefit history of one of the four individuals who were discriminatorially selected over the plaintiff. The Vacancy Announcement for that position (Tr.; Exh.) was advertised as a GS-15 as an underfilled GS-16 position and states that the incumbent would be promoted without competition as soon as a GS-16 slot became available. In 1977, the selectee was accordingly promoted as the plaintiff would have been absent the now uncontested discrimination. At least one of the other three selectees was also promoted further. App. G at 126a-129a; Decl.; Exh..

District Court filed a Memorandum Order on September 9, 1989 (App. C) that included a ruling that there was a continuing pattern or practice of discrimination

sufficient to justify an award of back pay going back to 1973 (not 1975 as cited in App. A at a5). App. C at 75a-77a, 85a. The court also ruled that the plaintiff "[h]as presented a strong case for constructive discharge" (App. C at 81a). That ruling was based on the court's comparative analysis of the circumstances in the then precedent circuit cases of *Hopkins v. Price Waterhouse*, 263 U.S. App. D.C. 321, 825 F.2d 458 (1987), reversed on other grounds, 109 S.Ct. 1775 (1989); and *Clark v. Marsh*, 214 U.S.App.D.C. 350, 665 F.2d 1168 (1981), with the instant case. App. C at 78a-84a. In referring to the record, the District Court concluded that:

"Under these circumstances, it is understandable that the plaintiff decided to accept termination since a reasonable person would have concluded that all he could have expected was more of the same, and that a reasonable person would have concluded that those working conditions were intolerable. The Court concludes based upon those facts that the Plaintiff was

constructively discharged from his position.". App. C at 83. Emphasis added

In it's analysis, the District Court apparently did not feel it necessary to consider the plaintiff's claim that "... he was sitting at his desk with nothing to do and that he found this to be repugnant." App. C at 83.

District Court denied the requested tracking of the promotion history of the chosen selectee by ruling that "Whether the plaintiff would have been promoted to a Grade 16 is subject to speculation." Petitioner submits that this ruling is error. App. C at 84a.

The court issued an Order on May 11, 1992 (App. D) granting, in pertinent part, relief for the constructive discharge. The defendant appealed, in pertinent part, claiming insufficiency of evidence for the constructive discharge decision of District

Court. The plaintiff cross-appealed, in pertinent part, for the requested tracking of the promotion history of the selectee for make-whole relief. App. E at 93a-94a, 104a-105a; App. G at 126a-130a; App. H at 142a-146a.

The Court of Appeals ruled, in pertinent part, that: (i) "... a District Court must find not only intentional discrimination, but also 'aggravating factors.'"; and, (ii) "Under the case law of this circuit, the trial court's finding's plainly cannot support a conclusion that Dashnaw was constructively discharged. We also find that the record is insufficient to support a constructive discharge claim."; and, (iii) on the appellee/cross appellant's request for make-whole relief in tracking the promotion history of the chosen selectee, "Nothing in the record persuades us that this finding is clearly

erroneous, and we accordingly uphold it." (App. A at a7).

Petitioner's arguments on the claim of retaliatory conduct were not acknowledged. App. E at 100a-102a; App G at 109a, 124a-125a, 131a; App. H at 132a.

The cryptic notice by plaintiff's counsel to the court in 1982 on plaintiff's change in status was apparently relied on as an evidentiary statement by the Court of Appeals. App. A at a3-a4. That filing erroneously states that the plaintiff resigned. The evidentiary record shows that he was involuntarily separated.

Petitioner requested a rehearing, hearing en banc (App. E) which were denied.

REASONS FOR GRANTING THE PETITION

The questions are raised in view of the exceptional national importance of rising age discrimination in the work place. Specifically, this case presents

place. Specifically, this case presents questions on the standards for rulings on the discharge of older workers predicated on uncontested age discrimination and relief under ADEA.

The Supreme Court recognized age discrimination as a serious problem in *Massachusetts BD. of Retirement v. Murgia*, 427 U.S. 322-325 (1976). The Supreme Court has had little or no opportunity to address the problem of age discrimination with discharge in federal employment.

I

WHETHER DENIAL OF A PART OF THE REQUESTED MAKE-WHOLE RELIEF AS BEING "SPECULATIVE" IS CONSISTENT WITH THE STANDARDS SET BY THE SUPREME COURT

Petitioner submits that the lower courts erred in ruling that "Whether plaintiff would have been promoted to Grade 16 is subject to speculation." in denying part of the requested make-whole relief.

App. C at 84a; App. A at a7. To avoid repetition herein, please see petitioner's argument that he should have been further promoted as presented in App. H at 142a-146a, and App. G at 126a-130a. The enunciations in *Albermarle Paper Company v. Moody* 422 U.S. 405, 418-19 (1975) and of *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. at 762, 765 (1976) makes it clear that petitioner should have been promoted further under the circumstances of the case. The precedent in the circuit also supports this claim of the petitioner. See *Brown v. Marsh*, 713 F.Supp. 20 (D.D.C. 1989), at 24, where it is ordered that Brown's "[c]areer path shall track Scheuddig's." See also *Lander v. Lujan*, WL 294562 (D.D.C. 1991); Civ A. No. 85-3833 JGP on ordered promotion to SES grade. The relief granted should include tracking the promotion/benefit history of the selectee.

II

WHETHER THE COURT OF APPEALS APPLIED AN APPROPRIATE AND CONSISTENT STANDARD AND ADHERED TO THE GUIDANCE GIVEN BY THE SUPREME COURT IN REVERSING THE DISTRICT COURT'S RULING ON CONSTRUCTIVE DISCHARGE

Petitioner submits that his discharge, whether seen as either an actual or constructive discharge, may be established as a violation under ADEA by proving: disparate treatment without consideration of the uncontested finding of age discrimination; or, disparate treatment with consideration of the uncontested finding of age discrimination; or, retaliation against him for filing complaints and prosecuting his case; or, a hostile or intolerable work environment. See *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), 36 L.Ed.2d 668 (1973), and its progeny, *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248,

101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) for disparate treatment as recently exemplified in *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir. 1994). See *Clark* and *Hopkins* on disparate treatment with consideration of a finding of discrimination. Retaliation is addressed as a separate question below. See *Harris v. Forklift Systems, Inc.* 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), for the standard on hostile environment (if held to apply to ADEA under the circumstances of this case).

In *Gaworski*, a recent ADEA case, the 8th circuit found discriminatory termination by RIF without a predicate finding of age discrimination. There is no mention of "aggravating factors." The guidelines of *McDonnell Douglas* (411 U.S. at 802) and *Burdine* were followed. Petitioner submits that he would have also prevailed on the discharge issue in District Court under the

same reasoning and standards had the District Court articulated the steps in the *McDonnell Douglas & Burdine* guidelines to the petitioner's discharge as it did in the finding of age discrimination. The plaintiff met his burden of proof. The burden then shifts to defendant to show by a preponderance of the evidence that the plaintiff was RIF'd for legitimate nondiscriminatory reasons (see holding in *Price Waterhouse v. Hopkins,* 109 S.Ct. 1775 (1989), at 1795). The plaintiff showed that the reasons proffered for his being RIF'd were pretextual and not worthy of belief.

Petitioner submits that the agency had the ultimate burden of proof by a perponderance of the evidence, on the discharge issue only, after an uncontested finding of age discrimination following the reasoning of *Price Waterhouse, supra,* at 1795, and *N.L.R.B. v. Transportation Management*

Corp., 103 S.Ct., at 2469 (1983). In this light, the issue before the Court of Appeals would have been whether or not the agency met its burden of proof rather than the demand that plaintiff prove "aggravating factors."

After its finding of age discrimination in promotion, petitioner submits District Court reasonably based its finding of a "strong case of constructive discharge" on its knowledge and interpretation of the facts in this case with its comparative analysis on the Court of Appeals' decisions in *Hopkins* and *Clark*. It is reasonable to conclude that the District Court needed go no further after its comparative analysis that the standard of constructive discharge, albeit unclear, as set in *Hopkins* and *Clark* was met and thereby satisfy Rule 52(a). The District Court further based its decision on the

applicable legal and relevant standard of "intolerability of working conditions" that would "cause a reasonable person to quit." Petitioner submits that it was appropriate and reasonable for District Court to rely on those precedent cases of *Hopkins* and *Clark* and delimit its findings and conclusions accordingly.

It is clear in the record that petitioner wanted, and fought for, one of the positions that he deserved and to get out of the situation that he was forced into as exemplified in his first complaint and action since that time rather than be unemployed.

Petitioner further submits that the standard of "intolerability of working conditions" used by District Court is consistent with both *Burdine* and the hostile environment standard enunciated in *Harris* reaffirming *Meritor Sav. Bank, FSB*

v. Vinson, 106 S.Ct. 2399 (1986). The *Meritor* standard, affirmed in *Harris*, is aimed at Title VII violations. It requires an objectively hostile or abusive environment as well as victim's objective perception that the environment is abusive and requires consideration of all the circumstances, not any one factor, and that the severity offends broad rule of workplace equality. Petitioner submits that the facts of the case and perception of the petitioner fit those standards. Petitioner submits that District Court correctly found constructive discharge by considering all the circumstances, frequency of conduct, its severity, physically threatening or humiliating as well known to the court. Such circumstances and events are recited in the above Statement of Case and more fully in the record. Petitioner submits that he should be afforded the same right

to work and to work in an environment free from discriminatory intimidation, ridicule, and insults as those protected under Title VII aside from the legitimate expectations of petitioner to be promoted per agreement. See *Meritor, supra,* at 2405.

The one brief paragraph on the Court of Appeals' analysis on the issue of constructive discharge (App. A at a7) gives no showing that it either: followed the dictates of *Anderson,* 105 S.Ct. 1504; or, followed the guidance and standard provided by the Supreme Court in *Harris* and *Meritor* and *Price Waterhouse;* or, held to the circuit's own precedents of *Hopkins,* and *Clark;* or, precedents in other circuits such as in *Rodgers v. Western-Southern Life Ins. Co.,* 12 F.3d 668 (7th Cir. 1993) or *Wilson v. Monarch Paper Co.,* 939 F.2d 1138 (8th Cir. (1991); or, considered the evidence in the light of the *McDonnell*

Douglas guidelines; or, fairly considered the facts and the law presented by Appellee/Cross-Appellant in Appendices G, H, & E. Further, there is no indication that the Panel reviewed the record in favor of appellee.

The Panels apparent brief review of this case with its voluminous record with 9 days of trial and numerous filings and exhibits and court memoranda strongly suggests that the panel did not adhere to the dictate of *Anderson*, that:

"If the district court's *account of the evidence is plausible in light of the record viewed in its entirety*, the court of appeals may not reverse it ..."

There is nothing in the Appeals Court's decision that suggests that the record was so viewed or that any of the extensive arguments on the facts and the law presented by the appellee were considered.

Petitioner submits that the Panel

failed to credit the standard used by the trier of fact in his comparative analysis with *Hopkins & Clark* and his knowledge and interpretation of the facts in its statement:

> "[I]n this case, the District Court found no aggravating factors at all, but simply relied on its finding that MARAD had discriminatorially failed to promote Dashnaw as support for its conclusion that the agency had made appellee's working conditions 'intolerable'." See App.A at a7.

Chief Judge Penn, who is noted for his sound deliberations, did not give any indication that he relied only on a failure to promote to support his finding of "a strong case of constructive discharge" nor did he use the expression "aggravating factors" at all. However, petitioner submits that it can be fairly drawn that the Court of Appeals did itself rely solely on "failure to promote" in its finding of constructive discharge in its reversal of the District Court's decision in the case

of *Hopkins*, without any mention of the expression "aggravating factors." The only conditions cited by the Court of Appeals in *Hopkins* is that she was denied promotion and not renominated for promotion:

> [P]rice Waterhouse's decision to deny Hopkins partnership status, however, coupled with [its Office of Government Service's] failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career ending action. Accordingly, it amounted to a constructive discharge. App. C at 80a.

and,

> [I]ntolerableness of working conditions is very much a function of the reasonable expectations of the employee, including expectations of promotion or advancement. App. H at 140a.

That denial of promotion was for a much shorter period than the 15 years of denial of promotion in the instant case and the prospects for future promotion were no different. The Supreme Court makes no use of the term "aggravating factors" in *Price Waterhouse* or any other such civil rights

case known to petitioner. The Court of Appeals makes no mention of *Hopkins'* case in its review of the instant case or shows where Judge Penn erred in his comparative analysis of *Hopkins* and *Clark* with respect to the instant case.

In *Clark*, the District Court did not make a finding of "constructive discharge" (see *Clark, Supra* at 1171). The Court of Appeals granted relief for such a finding based on little more than nonpromotion (App. C at 79a) with only passing reference to, and no identification of, any "aggravating factors" per se, stating:

> [P]laintiff does not claim only a single instance of nonpromotion, or even simply a period of nonpromotion. Instead she alleges, and the district court found, a continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, existing over a period of years. See *Clark, supra.* at 1174.

In further comparison, petitioner submits

that the intolerability of conditions are much less severe in *Clark,* who voluntarily retired, (App. C at 78a) than those in the instant case. Hence, the District court's finding that plaintiff had a "strong case of constructive discharge" is reasonable.

In *Bishopp v. District of Columbia,* 788 F.2d 781 (D.C. Cir. 1986) cited by the Appeals Court (App. A at a7), the District Court had found for the employer on all counts. The Court of Appeals, in reversing the finding of discrimination and remanding the claims of constructive discharge and retaliation back for reconsideration, mentioned the expression "aggravating factors," at 789-790, citing *Clark,* but failed to identify any such "factors" to support its action. By inferring a definition from *Hopkins* and *Clark,* the instant case is replete with "aggravating factors."

The Court of Appeals cites the case of

Katradis v. Dav-El of Washington, 846 F.2d 1482, 1485 (D.C.Cir. 1988). App. A at a7. as support of for its claim that:

> [a] District Court must find not only intentional discrimination, but also "aggravating factors."

There is no such reference to "aggravating factors" on either of the cited pages (beginning page and ending page) or elsewhere in *Katradis*.

Petitioner submits that the Court of Appeals applied either an incorrect or inappropriate standard in the instant case in ruling that it could not find any "aggravating factors," whatever its meaning, or incorrectly or inconsistently applied it. The Supreme Court in *Harris & Meritor* uses the more descriptive terms "hostile environment" and "abusive environment." The questionable meaning of the yet undefined expression "aggravating factors" does not necessarily yield the same inter-

pretation and weight as the *Meritor* standard as refined in *Harris*. It has not been found where the D.C. Circuit has ever cited *Meritor* since it was decided in 1986 for comparison.

In the constructive discharge case of *Rodgers*, citing *Meritor* at 673, the Seventh Circuit, at 667, adopted "a test that focuses on the impact of the employer's actions on a reasonable person." District Court in the instant case also used a reasonable person standard. In *Rodgers*, there is no use of the term "aggravating factors." Petitioner submits that District Court's decision in the instant case has as much or more merit than that in *Rodgers*.

In *Wilson*, a jury trial ADEA case on age discrimination and retaliation and constructive discharge, there is no mention of "aggravating factors." There are some striking similarities with the instant

case. At 1138, 1145, it was found that:

"[e]mployer was actively seeking to 'bring in new blood' to management and that younger men were in fact given employee's responsibilities as his job was slowly eliminated through process of attrition.";

and, at 1148, that:

"[W]ilson was involuntarily terminated and rendered jobless by a condition directly caused by the discriminatory conduct of Monarch."

Judge Penn had adequate evidence to decide the issue of constructive discharge by the preponderance of evidence standard and the standard of "intolerability of working conditions" consistent with the *Meritor* standard. Petitioner submits that the trier of fact is clearly best able to weigh working conditions, humiliating factors, etc., with his notes and superior knowledge of a case in making a decision on intolerability. The Supreme Court in *Hicks* seems to support that reasoning. The credibility of witnesses is also relevant.

See *Anderson, supra,* at 1511-12. The lack of credibility of the defendant's witnesses is reflected in the trial testimony, exhibits, court's Memorandum and Memorandum Order and subsequent affidavits and exhibits.

In *Harris, supra* at 371, the Supreme Court extended it's guidelines to Title VII cases of race, gender, religion, or national origin to help reduce the conflict between the circuits but with no mention of age discrimination.

Petitioner submits that the Court of Appeals' reversal of District Court's decision in *Hopkins* from a finding of no constructive discharge, and the granting of relief for constructive discharge after the lack of a finding of constructive discharge in *Clark* and then reversing the District Court's finding of constructive discharge in the instant case that relied on those

decisions, is both incongruent and incomprehensible. Even assuming a valid difference of opinion on how the *Hopkins & Clark* decisions were interpreted by the District Court, petitioner submits that the Court of Appeals should have remanded the case back to District Court as done in *Bishopp*, in fairness to petitioner, for more appropriate findings. App. E at 93, 99, 102.

Petitioner submits that the facts in his case show more than a reasonably close nexus between age as a substantial factor and his discharge. The causal relationship between age and discharge of older personnel is more than inferred in the extensive evidence on pattern-or-practice and similar acts extensively covered at trial.

The unrefuted forced transfer and layering of plaintiff would, alone, cause a reasonable professional person to quit as would the denial of any new work or assign-

ments and his having to sit at an empty desk with nothing to do. All the evidence is connected and consistent with the rulings of Judge Penn.

As shown above, The lower courts did not have or consequently use a clear and consistent standard for the determination of "constructive discharge" predicated on a separate finding of age discrimination for other cause. Petitioner submits that there is a need for further guidance of the Supreme Court in this area of law and to expand the body of experience and informed judgment to which the courts and litigants can rely on. There may be appropriate and meaningful differences in criteria for constructive discharge under ADEA as opposed to Title VII. The need for better decision criteria is further illustrated by the fact that each of the Title VII constructive discharge cases cited by District

Court and Court of Appeals were reversed up or down. None of the cases held as precedents by the lower courts in this matter are ADEA cases. Further, the District Court's decision should not have been reversed unless it committed legal error or there was a "definite and firm conviction that a mistake has been committed." *United States v. Gypsum*, 333 U.S. 364, 365, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

III

WHETHER IT WAS ERROR FOR PANEL TO FAIL TO CONSIDER THE ARGUMENTS ON THE RETALIATORY CONDUCT ON CONSTRUCTIVE DISCHARGE CLAIM

Petitioner submits that the Panel erred by failing to consider retaliatory conduct/motive in the discharge of the petitioner as argued by the Cross-Appellant/Appellee. To avoid repetition herein please see arguments at App. G at 109a, 124a-125a, 131a; App. H at 132a; App. E at 100a-102a.

The inference that the respondent wanted the petitioner gone can be fairly drawn based on the record. It seems clear that substantial culpable retaliatory motive and conduct occurred notwithstanding the intertwining of conditions and events that could show both retaliatory conduct and the uncontested age discrimination. The filing of his verbal complaint in 1975 marked the end of his spotless career which led to denial of assignments and ultimately his involuntary termination.

The RIF of the petitioner was contrary to the Veterans Preference Act by not giving petitioner a real alternative. Further, had the plaintiff been promoted as he should have been, as later decided by the court, his job could not have been abolished. The agency must have intended that consequence. Use of the retirement system should not be allowed as a tool to

get rid of older employees such as the petitioner and to deny him the relief that he sought.

A retaliatory motive can be inferred from defendant's awareness of plaintiff's complaints of age discrimination and the agency's pattern of conduct as shown in the record. There is no credible explanation for the agency's conduct other than age discrimination and/or retaliation and the agency offered none. Employer may not discharge employee for opposing practices made unlawful by ADEA.[1] The Supreme Court, in *N.L.R.B. v. Transportation Management Corp, supra*, at 2469, in a case of retaliatory discharge, held that:

"... burden of proof was properly placed on

---

[1] ADEA, 29 U.S.C. § 623(d), makes it unlawful for an employer to discriminate against any of his employees ... because individual, ... has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

employer to prove by a preponderance of the evidence that employee would have been fired for permissible reasons ...".

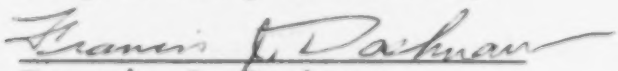
The defendant failed to meet that burden.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the District of Columbia should be granted.

Decisions involving age discrimination deserve special attention because of time and age factors and misuse of retirement plans. It has been 19 years since petitioner filed his first complaint. The Supreme Court could assume a special burden to make the ADEA more workable.

Respectfully submitted,



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Petitioner

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APPENDICES

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* Non-pertinent material and references to Joint Appendix to Court of Appeals ("J.A."), and Trial Transcripts ("tr."), and Declarations ("Decl."), and court renderings, are not included herein.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 24, 1993 Decided January 7, 1994

Nos. 92-5256 & 92-5274

FRANCIS J. DASHNAW,
APPELLEE-CROSS-APPELLANT

v.

FEDERICO PEÑA,
SECRETARY OF TRANSPORTATION,
APPELLANT-CROSS-APPELLEE

On Appeal from the United States District Court
for the District of Columbia
(No. 77-CV-01342)

Charles F. Flynn, Assistant United States Attorney, argued the cause for appellant. With him on the briefs were *Eric H. Holder, Jr.*, United States Attorney, *John D. Bates* and *R. Craig Lawrence*, Assistant United States Attorneys.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Joel P. Bennett argued the cause and filed the brief for appellee.

Before: EDWARDS and SILBERMAN, *Circuit Judges*, and RESTANI,* *Judge*, United States Court of International Trade.

Opinion for the Court filed PER CURIAM.

PER CURIAM: This case involves a complaint of age discrimination that was filed in the District Court in 1977. A trial was conducted on the complaint in 1980; subsequently, in 1982, before a judgment had been issued on the complaint, the plaintiff-appellee, Francis J. Dashnaw, retired from his employment with the appellant, the Department of Transportation ("Department"). In 1986, Dashnaw belatedly claimed that his retirement had resulted from a "constructive discharge" due to unlawful age discrimination; however, the complaint was never amended to include this charge and no trial was ever held on the issue. Finally, in 1992, 15 years after the filing of the complaint and 12 years after trial, the trial court issued a final judgment. This judgment not only resolved the original claim of age discrimination, but also the belated claim of constructive discharge.

In this appeal, the Department challenges a portion of the decision of the District Court. Appellant does not contest the District Court's finding that Dashnaw was the victim of age discrimination, but argues that the court erred in finding that Dashnaw was constructively discharged when he left his position in 1982 as a result of a reduction in force at the Federal Maritime Administration ("MARAD"), a division of the Department of Transportation. We reverse the trial court's constructive discharge finding on the ground that there was insufficient evidence to support it. This circuit's precedents make clear that, in order to find constructive discharge, a court must find not merely that a plaintiff employee was subject to intentional discrimination, but also that there were aggravating factors that drove him or her to quit. Because the District Court made no such findings, and because we find the record inadequate to support a claim of

---

* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1988).

constructive discharge, it was error for the trial court to award relief to Dashnaw based on such a claim.

In addition, Dashnaw cross-appeals two aspects of the decision below. First, he contends that the District Court should have retroactively promoted him to the GS–16 level, rather than merely to GS–15. Second, he urges that the trial court should have awarded him additional compensation to help cover the higher taxes he will have to pay because he will receive his backpay in a lump sum.[1] We hold that both of these arguments are without merit.

I. Background

Dashnaw was hired by MARAD in 1967 as an engineer at GS–14. In 1977, Dashnaw filed a complaint in District Court alleging employment discrimination on the basis of age, national origin, religion and race. By the time of trial, Dashnaw alleged only that he had been discriminated against on the basis of his age, in violation of the Age Discrimination in Employment Act's ("ADEA") provisions for federal employees, 42 U.S.C. § 633a (1988), chiefly on the ground that he had been denied promotions that went instead to younger candidates.

The District Court conducted a bench trial from April 21 through May 1, 1980. In July 1982, before any judgment had issued in his case, Dashnaw filed a document with the court entitled "Notice of Change in Plaintiff's Employment Status," which read as follows:

---

[1] Dashnaw also argued in this appeal that the District Court improperly denied his request for prejudgment interest on the portion of his backpay dating from his departure from MARAD in 1982 to the present. However, because we reverse the trial court's finding of constructive discharge, this argument is moot. Both parties agree that the Government's sovereign immunity precludes interest on backpay claims that grow out of a failure to promote, *see Brown v. Secretary of the Army*, 918 F.2d 214, 218-21 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 57 (1991), and accordingly agree that Dashnaw cannot collect interest on backpay awarded for the period prior to the time he left MARAD.

> Plaintiff hereby notifies the Court that the position held by the plaintiff at the Maritime Administration was abolished in April, 1982, under reduction in force (RIF) procedure. Plaintiff declined another job offer, resigned and has applied for discontinued service retirement. He is currently unemployed. Since this matter was tried in April, 1980, and has been pending decision since June of 1980, plaintiff respectfully requests that the Court expedite decision in this matter and render a decision within the next thirty (30) days.

Joint Appendix ("J.A.") 139. In the following three years, appellee filed four additional requests for expedited consideration and two motions for status calls. Brief for Appellant at 3. These motions did not allege that he had been constructively discharged nor did they mention the circumstances of his retirement.

In July 1985, the trial court ordered that Dashnaw be promoted to GS–15 retroactive to an unspecified date, and receive backpay. The memorandum accompanying this order did not address plaintiff's 1982 retirement. Appellant moved to amend this judgment on the ground that the District Court's memorandum referred to documents that had not been admitted into evidence. The court granted appellant's motion in June 1986, vacating the July 1985 judgment.

On August 19, 1986, appellee filed a two-page motion again requesting expedited consideration of his case. This motion did not use the words "constructive discharge," but did state that: "Plaintiff submits that his retirement in the face of being offered a position with no description or duties was in effect involuntary and would not have occurred if he had not been discriminated against with respect to promotion in the 1970s." Plaintiff's Motion for Decision, *reprinted in* J.A. 140, 141.

On April 4, 1988, the District Court issued a memorandum finding that Dashnaw had been discriminated against on the basis of his age on four occasions in 1975–76 during which he was denied promotions. However, the trial court's findings made no reference to constructive discharge, and they did not

include an order. The District Court invited Dashnaw to propose a remedial order, after which appellee recommended that he be reinstated with backpay as if he had not left MARAD in 1982. Both sides then filed multiple affidavits and exhibits concerning the circumstances surrounding Dashnaw's departure from MARAD. *See* J.A. 151–220.

The District Court issued a memorandum order on September 11, 1989, finding that Dashnaw was entitled to a retroactive promotion to the GS–15 level, effective two years prior to the date he filed his complaint. *See* Sept. 11, 1989 Order, *reprinted in* J.A. 55, 56. The memorandum proceeded to consider the constructive discharge claim, noting that it did not credit appellant's contentions that, when the plaintiff's job had been eliminated in 1982, Dashnaw had been offered an alternative job from which he was likely to attain the promotion to GS–15 which he had long sought. *Id.* at J.A. 59. The trial court found that Dashnaw was constructively discharged because "a reasonable person would have concluded that those working conditions were intolerable." *Id.* at J.A. 60.

On May 11, 1992, the District Court issued the order appealed from in this case. This order directed that plaintiff be reinstated as a GS–15 and receive backpay from 1975 through the date of the order, subject to appropriate mitigation as determined by the parties' subsequent discovery. Because the court found that Dashnaw was constructively discharged in 1982, its backpay award included the years after appellant left MARAD's employ.

II. Discussion

The Department's chief argument is that Dashnaw's constructive discharge claim was not timely raised. The ADEA provides that a federal employee age discrimination plaintiff may not commence a civil suit concerning his claim until thirty days after he has given the Equal Employment Opportunity Commission ("EEOC") notice of his intent to sue:

> When the individual has not filed a complaint concerning age discrimination with the Commission, no civil

> action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of the unlawful practice.

42 U.S.C. § 633a(d) (1988). Such notice must be given to the EEOC, or, alternatively, to the plaintiff's employing agency, no later than one hundred and eighty days after the alleged unlawful discrimination occurred. *See generally Stevens v. Department of Treasury*, 111 S. Ct. 1562 (1991) (discussing requirements of 42 U.S.C. § 633a(d)). Appellant contends that Dashnaw did not allege constructive discharge in a timely fashion because he did not mention this claim in any of his filings in the trial court, or give any sort of notice of the claim to the EEOC or to MARAD, until long after the periods allotted by section 633a(d) had elapsed.

While section 633a(d) could be read to support the contention that Dashnaw's constructive discharge claim was untimely, we are unwilling so to hold in light of the Department's handling of the claim before the trial court. The Department's sole response to Dashnaw's belated allegation of constructive discharge in the District Court was to file a series of counter-affidavits that disputed the factual bases of his claim. Indeed, counsel for appellant conceded at oral argument that the Department never suggested to the trial court that Dashnaw's claim was time-barred, and never petitioned for rehearing of the constructive discharge ruling.

Given that appellant has, until now, behaved as if it agreed that the constructive discharge issue was a valid question of the relief available in this case, we will treat this question as falling within the bounds of our decision in *Clark v. Marsh*, 665 F.2d 1168, 1172 n.4 (D.C. Cir. 1981), in which we held that a Title VII plaintiff could recover for constructive discharge

despite the fact that she had failed to allege that claim in either her administrative notice or complaint. Because we assume that Dashnaw's constructive discharge claim was properly before the District Court, we will treat the Department's challenge as an attack on the sufficiency of the evidence relied on by the trial court to support its grant of relief based upon that claim.

The law of the circuit makes clear that, in order to find constructive discharge in a case involving a claim of discrimination, a District Court must find not only intentional discrimination, but also "aggravating factors." *Clark*, 665 F.2d at 1174; *see also Katradis v. Dav-El of Washington*, 846 F.2d 1482, 1485 (D.C. Cir. 1988); *Bishopp v. District of Columbia*, 788 F.2d 781, 789–90 (D.C. Cir. 1986). In this case, the District Court found no aggravating factors at all, but simply relied on its finding that MARAD had discriminatorially failed to promote Dashnaw as support for its conclusion that the agency had made appellee's working conditions "intolerable." *See* Sept. 11, 1989 Order, at J.A. 59–60. Under the case law of this circuit, the trial court's findings plainly cannot support a conclusion that Dashnaw was constructively discharged. We also find that the record is insufficient to support a constructive discharge claim. We thus hold that the District Court erred in granting relief based upon the assumption that Dashnaw's employment at MARAD should be deemed to have continued during the years after he left that agency in 1982. Accordingly, appellee is not entitled to reinstatement or to backpay for the period following his departure from MARAD.

Finally, we need not linger long on Dashnaw's cross-claims. First, Dashnaw contends that the District Court should have calculated his backpay based upon the assumption that he would have been promoted to the GS–16 level, rather than to GS–15. The District Court found that whether appellee would have been promoted to GS–16 was "subject to speculation," and so refused to order such relief. Sept. 11, 1989 Order, at J.A. 60. Nothing in the record persuades us that this finding is clearly erroneous, and we accordingly uphold it.

Dashnaw also argues that the District Court should have granted him additional compensation to help cover the higher taxes he will have to pay because he will receive his backpay in a lump sum rather than as salary paid out over a period of years. Absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support "gross-ups" of backpay to cover tax liability. We know of no authority for such relief, and appellee points to none. Given the complete lack of support in existing case law for tax gross-ups, we decline so to extend the law in this case. We therefore reject Dashnaw's request for additional compensation to cover his tax liability.

III. Conclusion

For the reasons discussed above, the District Court's finding of constructive discharge is reversed. The District Court's judgment is affirmed in all other respects, and the case is remanded for calculation of the damages owed to appellee Dashnaw.

So ordered.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS J. DASHNAW,
Plaintiff

v.

C. WILLIAM VERITY,
SECRETARY OF COMMERCE
DEPARTMENT OF COMMERCE,
Defendant

FILED
April 4, 1988

Civil Action
No. 77-1342

MEMORANDUM

The plaintiff filed this action pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621, et seq., and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. The claim under Title VII alleged that he has been discrimination against based on his national origin, his religion and his race. Prior to the trial in this case, the plaintiff withdrew his claim filed pursuant to Title VII and elected to go forward with his age

discrimination claim.

This memorandum constitutes the Court's findings of fact and conclusion of law. See Fed. R. Civ. P. 52. In Part I, the Court briefly sets forth the claims asserted by the plaintiff and the applicable law relating thereto. In Part II, the Court discusses certain findings, and in Part III, the Court sets forth specific finding which are in addition to and supplemental to the findings in Part II.

The Court had previously entered findings in this case in July 1985. Thereafter, the defendant moved to alter or amendment the judgment on the grounds that the Court, in making its decision, had referred to certain documents or comments on documents which were not actually admitted as evidence in the case. The plaintiff opposed the motion. Thereafter, the Court was advised that the par-

ties were discussing the possibility of settling some or all of the issues in this case. The parties were unsuccessful in their settlement negotiations and the case is back before the Court. Pursuant to the motion to amend or alter judgment, the Court has reviewed the evidence and concludes that it did refer to several documents in its earlier findings which had not be received in evidence.

The Court had previously vacated its earlier memorandum and order to permit the parties to consider settlement. See Order filed June 26, 1986.

After giving careful consideration to the evidence in this case and the submissions of the parties, the Court concludes that the plaintiff established a prima facie case of discrimination under the ADEA. In doing so, the Court has not considered those documents which were not

received in evidence. The Court further concludes that the defendant discriminated against the plaintiff in the agency's non-selection of the plaintiff for the positions which are the subject of this action.

Finally, the Court concludes that the plaintiff is entitled to judgment.

I

Prior to the date of this litigation the plaintiff was employed by the Maritime Administration (MARAD) as an engineer. He applied for four positions over the course of two years, namely, Announcement 139-VWR-75, Chief, Division of Production, Office of Ship Construction, Announcement 146-VWR-76, General Engineer, Announcement 86-VWR-76, Chief, Division of Foreign Costs, and Announcement 36-VWR-76, Director, Office of Ship Building Costs. He was not selected for any of these positions

and as a result he filed this action. The plaintiff has exhausted any required administrative remedies and this case is properly before the Court.

The plaintiff established a prima facie case of a violation of the Age Discrimination in Employment Act. He demonstrated that he was a member of the protected group, in that he was at least 47 years old in 1975 when he was considered for selection under Announcements 139-VWR-75 and 146-VWR-76 and, of course, one year older when considered for Announcements 86-VWR-76 and 36-VWR-76; he was not selected for any of the above positions; that each of the selectees for the positions was a younger person; and that he was qualified for the positions. See McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973) (establishment of a prima facie case in a Title VII

action). The McDonnell-Douglas standard has been applied in ADEA cases as well. See Cuddy v. Carman, 224 U.S. App. D.C. 287, 290-291, 694 F.2d 853, 856-857 (1982). The evidence in this case demonstrates that the plaintiff was qualified for the four positions in the sense that he possessed the necessary prerequisites. Although almost all of the members of the rating panels and the selecting officials admitted that the plaintiff's work was average, above average or excellent, the non-selections were based on the conclusion that the plaintiff was not as well qualified as the person actually selected.

Once the plaintiff establishes his prima facie case, the burden then falls on the defendant to go forward and to present evidence demonstrating a legitimate and non-discriminatory basis for the plaintiff's non-selection. See Texas Department

of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981). Then the burden shifts back to the plaintiff to "show pretext and to carry the ultimate burden of persuasion". Cuddy, supra, U.S. App. D.C. at 293, F.2d at 859. The overall burden remains on the plaintiff and it rests upon him to establish that age was "a determining factor" for his non-selection. Cuddy, U.S. App. D.C. at 291, F.2d at 857.

The Court finds that the plaintiff met the ultimate burden, and conversely finds that the defendant did not demonstrate that the failure to select the plaintiff was for legitimate, non-discriminatory reasons. Because of these findings the plaintiff is entitled to judgment.

II

Establishing a claim of discrimina-

tion is not an easy task because "(e)mployees and applicants for employment have great informational disadvantages: they cannot reach into the minds of decision-makers, and therefore they usually can gather only circumstantial evidence of discriminatory motives". Cuddy, U.S. App. D.C. at 293, F.2d at 859 (footnote omitted).

Here, the defendant presented evidence which purports to show that, although the plaintiff was a qualified engineer and had performed "average" to "exceptional" work for the agency, he was not qualified to be a supervisor. The defendant's witnesses contended that the plaintiff excelled in limited areas, that his experience was narrow, and that he had difficulty in getting along with supervisors and that he chose to keep his work to himself. Such "facts" when considered in

isolation do appear to support the defendant's contention that the plaintiff may not have been qualified. Moreover, it is well known that a person who may be brilliant in his chosen field may nevertheless prove to be a poor leader or supervisor. But, when the totality of the evidence in this case is considered the picture changes.

The first impressions gained from considering the evidence in this case is that, for whatever reason, the plaintiff was not well liked in certain circles of the agency. At least one of the members of a rating panel, which considered his application for appointment to a new position, observed that it was mentioned during the panel discussion that the plaintiff had filed discrimination complaints against the agency. Thus, it appears that the plaintiff was viewed as a

trouble maker because he challenged real or imagined discrimination. It also appears that he did not limit his claims of discrimination to that of age discrimination, but in addition, claimed discrimination based on his religion, his race, and his national origin. He contended that the "defendant's promotion and transfer process favored Jews and those of German origin over [him)". Complaint par. 13. The only issue here, however, is age discrimination.

The plaintiff also contends that the defendant engaged in preselection of applicants for certain positions. He contends, for example, that a number of people selected to fill certain employment vacancies were friends or former co-workers of rating panel members or of selecting officials. Plaintiff cites, in particular, the fact that several persons who

competed with him in the selection process had formerly been employed by Martin Marietta and that they were recommended or selected by a former employee of that private corporation.

This Court finds that the evidence supports the contention that the agency did engage in preselection for certain positions. Some positions were filled by friends of panel members or selecting officials. In one instance, a MARAD official happened to meet a friend who was or had been employed at Martin Marietta. When the friend indicated an interest in working at MARAD, he was encouraged to apply. An application was filed and that person was eventually selected after consideration by a rating panel and a selecting official; this notwithstanding the fact that qualified applicants from within the agency were not selected.

Another indication that preselection was utilized by the agency is the manner in which the rating panels were selected, the manner in which the panels were assigned to consider applicants, and the lack of care in furnishing panel members with reports concerning the applicants and the lack of care in assigning point totals to the applicants.

Under the procedure used by the agency, once a vacancy announcement was published, a rating panel was appointed to consider the interested applicants, and thereafter, the comments of the rating panel were passed on to the selecting official who had the ultimate responsibility to make the final selection. In most cases, the panel members were designated by a personnel specialist who had no knowledge of the working requirements of the positions under consideration. Thus,

for example, although a position might be in the field of engineering, some of the persons who were selected to serve on rating panel were not engineers and may have had little or no understanding of the requirements of the position for which they were considering applicants. The record also reflects, and this Court finds as a fact, that often a member of the panel did not have, or at least did not utilize, information concerning the individual applicants.

As was noted earlier, the plaintiff originally brought this action pursuant to Title VII as well as the ADEA. Although the plaintiff dismissed his Title VII claims, evidence of discrimination under Title VII does have relevance to the plaintiff's complaint that he was discriminated against because of his age. The fact that one discriminates against a

particular group suggests the possibility that the person may also discriminate against some other group. Several witnesses called by the plaintiff complained of such discrimination. A former secretary complained that she had been discriminated against because of her race. Apparently, the secretary, although black, had a very light complexion and some who did not know her assumed that she was white. The other employee, who testified at the trial, stated that the official told him that "Mrs. King does not look like a black person but you will be able to tell she is by the quality of her work." The official who allegedly made that statement did not deny doing so but gives the following reasons for his remarks:

> Yes. I informed Mr. ___ first that Mrs. King was black, even though she looked - at least to me - white because I had been in the office for some time before I found out the fact that she was particularly

sensitive to the fact. I also informed him that in my opinion her work product was not very satisfactory; that I had some very difficult times with her and I felt that she should know what the situation in the office was.

Apparently as an afterthought, and to show his good will, the official testified that he was stunned and shocked that his statement had been reported, that he though he was a close friend of the person who reported his statement and "thought that at least we understood each other on this particular topic. I had not told him the obvious, but I hired him. He was a spanish surname."

Finally, as noted in Part III, infra, the agency had a program in which it sought to bring into the agency "younger" people. This is reflected in the agency program and was reflected by remarks made by officials.

This Court finds that the agency

discriminated against the plaintiff because of his age. The Court therefore concludes for the reasons set forth in Part II, and the reasons set forth in Part III, that age was a determining factor in the nonselection of the plaintiff for the four positions at issue in this case.

The evidence in this case is clear that the agency did not utilize a fair system for the consideration of applicants for promotions or applicants for positions within the agency. The plaintiff has met his burden and has demonstrated that age was a determining factor in his non-selection to the positions for which he applied. Accordingly, he is now entitled to the relief he seeks.

III

After giving careful consideration to the evidence, the Court makes the following findings of fact, which are in addi-

tion to those set forth in Part II, supra.

1. This case arises under the ADEA. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 633a (c). Plaintiff voluntarily dismissed Count I of this complaint, which alleged a violation of the Equal Employment Opportunity Act, Title VII.

2. At the time of the trial, the plaintiff was employed as a general engineer, GS-801-14, in MARAD, a unit of the Department of Commerce. He is within the group protected under the ADEA, meaning at all times relevant hereto he was over the age of 40.

3. The plaintiff filed formal complaints of discrimination on or about September 12, 1975 (amended September 26, 1975), April 8, 1976 (amended May 7, 1976), June 28, 1976, and July 25, 1976.

4. The complaint of September 12,

1975, as amended on September 26, 1975, includes denial of promotion of plaintiff as a "career promotion as exception to the MPP," as other predominately younger personnel were so promoted because of age among other acts, the last of which was the June 22, 1975 transfer which effected a loss of rank, duties and opportunities and possible loss of job in the then upcoming advertised Civil Service Commission downgrading audit. Similar action in the past resulted in older individuals leaving the organization. For example, Mr. Andrea filed a discrimination complaint and thereafter withdrew it and accepted retirement on disability.

5. The plaintiff's complaint of April 8, 1976 includes both the non-promotion of the plaintiff as a career promotion because of age and the specific selections of Messrs. Karlson and Hammer

under Vacancy Announcement Nos. 139-VWR-75 and 148-VWR-75, respectively.

6. The plaintiff's complaint of June 28, 1976 also includes both the promotional policies and practices that allegedly continually denied a non-competitive career promotion of the plaintiff among other acts because of age and the specific selection of Mr. Pross under Vacancy Announcement No. 36-VWR-76.

7. The plaintiff's complaint of July 25, 1976 also includes both the promotional policies and practices that allegedly denied promotion of the plaintiff because of age and the specific selection of Mr. Schimler under Vacancy Announcement No. 86-VWR-76 among other actions.

8. The plaintiff was hired by the Maritime Administration on September 3, 1967 as a GS-801-14, step 1, at a substan-

tial reduction in income based on the understanding that he would be promoted to the GS-15 level as soon as the planned expansion of the R&D program went into effect. Mr. E. Kemper Sullivan placed a memorandum in the file to that effect.

9. At the time of hire into MARAD, the plaintiff's highly qualifying background in engineering was supported by three engineering degrees which were awarded primarily from evening school studies at colleges of high reputation with numerous additional courses and other training and supervisory experience. The plaintiff also continued his training efforts after hire by MARAD.

10. While employed at MARAD from September 1967 to the present time, plaintiff gained additional broad and highly substantial engineering experience of a non-recurring nature in the development of

improved ship components and related activities to reduce cost and to improve ship performance and safety. However, plaintiff was not offered other assignments to broaden his experience in other areas.

11. Prior to his hire into MARAD, plaintiff was determined to be eligible for GS-15 level engineering positions with high scores up to 101, including 5 points for veterans preference for World War II service.

12. Immediately prior to his hire into MARAD, plaintiff held an executive position with Chrysler Corporation Space Division as an engineering manager with supervision over a staff of approximately 42 professionals and technicians performing a wide variety of technical activities contributing to the success of the prime contract for the Saturn I and IB space

launch vehicles.

13. Following voluntary military service in World War II and return to schooling, and prior to the plaintiff's employment with Chrysler Corporation, he was employed by the U.S. Army Ordnance Corps, Watervliet Arsenal, where he was principally involved in the development and operation of new manufacturing processes for cannon and related components. This included the giving of direct technical directions to crew members in the operation of experimental production facilities and design and installation of new manufacturing facilities and performance of supervisory responsibilities over a research staff.

14. During his employment with the U.S. Army Ordnance Corps and Chrysler Corporation, the plaintiff was active in professional societies and provided assis-

tance to other government agencies and contractors. He received a number of recognitions for such service and also for his direct employment activities, including a suggestion award and his election into the honorary society Sigma Xi for excellence in research, while also attending college in the evening.

15. Plaintiff also received recognition for technical activities in both professional societies, including publication of papers and his participation in the interagency Ship Structure Subcommittee and the non-technical Commerce Toastmasters Club in which he won awards and held various positions, including the presidency.

16. Plaintiff's performance has always been rated no less than satisfactory throughout his employment and military service history. Plaintiff's perfor-

mance is described as more than satisfactory in the award nomination papers and his abilities are described as above average.

17.(a) The plaintiff made repeated and unusual efforts to be promoted as a "career promotion" as other predominately younger personnel were so promoted, through discussions with his supervisors, Messrs. Pitkin, Levin and Nachtsheim, and other efforts both before and after such recommendations for his promotion by his supervisors, Mr. E. Kemper Sullivan, Mr. R. Black, and Mr. D. Crook. These efforts included the preparation of requested preliminary proposed program plans and other documents that were not required of others prior to their promotion. Each of those several younger engineering personnel, promoted to GS-15 and above positions under Mr. Pitkin, were promoted without

any significant change in their duties and without competition, and apparently without publicity as "career promotion" and as "exceptions to competition" up to the date of the complaint. The defendant failed to rebut the fact that the plaintiff should have been promoted through this same means up to the present time to receive equitable treatment.

(b) The plaintiff was led to believe that he would be promoted up to two months after Mr. Andrea dropped his complaint of discrimination in favor of receiving an early retirement.

(c) The plaintiff performed cost/benefit analyses (economic analyses) to project the merit of new designs and innovations to improve ship production. He has also published a paper on cost implications of vibration damage.

18. The plaintiff also made re-

peated attempts to be promoted in MARAD through his responses to advertised vacancy announcements.

19. The plaintiff's considerable efforts to be promoted following his nearly two decades of participation in evening school to obtain his three engineering degrees and additional training shows considerable initiative.

20. Both the non-competitive promotions and the preselected hirings such as for those several former coworkers of Mr. Pitkin at Martin Marietta at unusually high grades and steps by Mr. Pitkin also diminished promotional opportunities for plaintiff by reducing the number of billets available for competition and reducing the available salary allocations.

21. The Maritime Administration was preoccupied with what is termed as an "age problem" through 1974 and perhaps 1975,

and instituted policies and practices to reduce the average age of its employees. The early effort to reduce the average age is further shown in the aim of MARAD management to "modernize and streamline the workforce" by simultaneous RIF's and hirings.

22. Lowering the average age in MARAD was considered an achievement by both MARAD and Department of Commerce officials.

23. MARAD's unusual inclusion of the ages of the staff members in the "Introduction to R&D" further points to the MARAD preoccupation of ages which was closely followed by the noncompetitive promotions to GS-15 of several of the younger staff members.

24. The existence of age discrimination in MARAD is further reflected in the testimony of the plaintiff, Andrea, John-

son, King, Cheng, LaPrade, and exhibits introduced by plaintiff. The existence of age discrimination is reflected in the investigator's note based on interviews. Sandra L. Jenkins, now Chief, Division of Litigation of the Office of the General Counsel of the Maritime Administration, and co-counsel for the defendant, states as the only conclusion of the Task Force in her memorandum for Carol Watkins, dated February 3, 1978, that:

> The Task Force found very few overt, expressed age criteria. It was generally felt that the most significant age discrimination exists covertly in the employment practices of some MARAD managers, rather than in the federally assisted programs.

25. The fact that MARAD made no apparent effort to specifically address age discrimination as an EEO matter and that MARAD has not held top level managers accountable, as indicated in the 1978 Personnel Management Evaluation Report is

consistent with the alleged policies and practices. The defendant did not show otherwise. The Personnel Management in the Maritime Administration April-June 1975 strongly suggests that any "plan" to address age discrimination would be as ineffective as the required Affirmative Action Plans.

26. The attitude of Mr. Nachtsheim is partially reflected in his statement which asserts, "I do feel that the potential of these trainees who felt they were being held down by the lack of higher level positions locked in by long-time Maritime Administration people is now being released." Mr. Nachtsheim's youth-oriented attitude is further reflected in Mr. Johnson's testimony and in Mr. Nachtsheim's regard of Mr. Pross and Mr. Kiss as being prime candidates to replace him. Comments were made to Mr. Nachtsheim on

Mr. Kiss' rapid promotions to high grades.

27. The bias toward the promotion of younger personnel is shown in the following: the pattern of unadvertised noncompetitive promotions to GS-15 and above levels by Mr. Pitkin; the pattern of all GS-15 hires and promotions of engineers and GS-16 promotions of personnel, and in the non-promotion of older personnel. Similarly, there were only two such personnel under age 40 who were eligible on or before 1/1/75 who failed to be promoted by 1/1/80, compared to fourteen older personnel who were not so promoted. Both the hire and subsequent promotion of Mr. Paraghamian is considered an exception to the practice of age discrimination because he is one of the several personnel hired by Mr. Pitkin from his former employer which appear to be preselections. The promotion of Mr. Higgins to GS-16, and GS-

17 is also an exception because of his prominent role on many rating panels that affected the recruitment, hire and promotion of many young individuals and preselected individuals.

It is significant that the defendant did not use the testimony of the plaintiff's immediate supervisor, Z. Levine, or any program manager who was on the witness list, but instead relied principally on the third-level supervisor, Mr. Pitkin (ADO) with respect to the plaintiff's performance. The fact that Mr. Pitkin has little direct knowledge of the plaintiff's work or performance is reflected in Mr. Pitkin's testimony that:

> I didn't have too much contact with Frank's working jobs per se because he reported to my office chief, who in turn reported to me, and I usually work throughout the organization, so I would keep tract of Mr. Dashnaw's work through his office activities and status.

28. The attitude of Mr. Higgins toward younger professionals and his inherent consideration of the age of applicants is well reflected in his testimony. His attitude is also reflected in Mr. Pitkin's statements in the award nomination that:

> If asked what his single, most important contribution has been, without hesitation he will point to the group of young professionals that he has recruited and trained over the past five years.

The Summary Statement to the award nomination adds:

> Specifically we point to Mr. Higgins' success in recruiting and training young professionals and making the federal service an attractive way of life for them

Mr. Higgins was a frequent rater. He showed strong preference for younger personnel.

29. Mr. D. Frye, a frequent promotion panel member, is shown to have calculated, sometimes inaccurately, the ages of

the applicants which he placed next to their names on his rating sheets. Mr. Frye claimed in his testimony that the calculations were done, "to assist me in evaluating his experience, to be sure I have all of his experience. These-numbers appear to conform to the pattern." This is not supported by any similar computations of periods of experience and comparison with his calculated ages nor his failure to consequently discover and correct his erroneous age computation which, in one case, was an error of 10 years. This, with the clear facts that Mr. Frye shows a strong tendency to give fewer points to older applicants than to younger applicants and his involvement in rating panels from which only young individuals were selected all indicate age bias. Further, his testimony reflects his preference for younger individuals.

30. The fact that the Merit Promotion Program is manipulated to meet the wishes of managers is further illustrated both for the high level "career promotions" and through the use of vacancy announcements. A joint report by the Department of Commerce and the U.S. Civil Service Commission on "Personnel Management in the Maritime Administration" states on p. 2:

MERIT PROMOTION
During the course of our reviews, we found that a significant number of MARAD employees believed that promotions were not given fairly, and as a consequence many employees felt they were denied opportunities for advancement. Furthermore we found serious deficiencies in the administration of the merit promotion program, including regulatory and procedural violations, which in our judgment, contributed to the beliefs employees had regarding the merit promotion program in the Maritime Administration. These deficiencies and violations included:

- Improper processing of promotions as exceptions to competition when the actions should have been open to competition.

- Failure to follow MARAD's Merit Promotion Plan by promoting non-competi-

tively beyond the career ladder grade range announced in the plan.

- Improper documentation of promotion records.

Some results of these deficiencies were:

- Employees were denied the opportunity to compete for promotions.
- Employees did not know why certain jobs were not open to competition.
- Promotion actions could not be reconstructed so that it could be determined on what basis employees were evaluated and ranked, and whether promotions were properly conducted.

As a result of the program changes in the Maritime Administration, reorganizations and reductions-in-force contributed to less effective internal communications and lowered employee morale. Many employees were uncertain as to where they fitted in with respect to the "new"Maritime Administration. Moreover, the redirected maritime program necessitated expansion of existing programs and, particularly, establishment of new programs. In order to meet the manpower needs generated by these expanded or new programs, MARAD management saw fit to recruit a large number of high-level managerial and supervisory personnel from outside of MARAD. In filling more than 70 top level positions in the past two years, approximately half of these positions were filled with "outsiders". Many employees, particularly middle management employees saw this recruitment effort as thwarting their promotional opportunities. Additionally, the aim of MARAD management was to modernize and streamline the workforce. To carry out this aim effectively, the work-

force was reduced by almost thirty percent. Many supervisors felt that they were required to do the same job with a reduced staff. All of these conditions contributed to low morale within the Maritime Administration.

31. The filling of over half of the 70 top-level positions with "outsiders" is clearly not by chance in view of the facts that: (1) the Manual of Orders MO 577(A), 2.02 Policy states, with particular reference to the last sentence that:

All vacancies shall be filled with the best qualified candidates available on the basis of merit, fitness and qualifications and without regard to race, color, religion, national origin, marital status, sex, or physical or mental handicap (which does not interfere with the performance of duties of the position), personal favoritism, or political or employee organizational affiliation; except as may be authorized or required by law. Concurrent consideration will be given, to the extent and under the procedures described in this plan, to qualified candidates either from within or outside the organization through the various staffing methods; e.g., reassignment and promotion of employees, transfer and reinstatement of outside candidates, appointment from Civil Service Registers and Applicant Supply Files. To the extent practicable, employees shall be afforded an opportunity for optimum development and

utilization of their abilities and shall be provided maximum opportunity for advancement and for assignment to positions with known promotion potential, consistent with the needs of the Maritime Administration. Selection of an outside candidate for an announced vacancy will be made only when the candidate is determined to be better qualified than any available Maritime Administration employee.

and, (2) the stated thirty percent concurring reduction of the workforce at that time. Still further, this report, on p. 13, states in pertinent part:

PROBLEM AREAS

MERIT PROMOTION
Questionnaires and interviews indicate that significant numbers of employees feel they are denied opportunities for advancement because promotions are not given fairly. Forty-seven percent stated that promotions are not fair. Furthermore, of the 201 managers, supervisors, and employees interviewed, 51 stated that promotions are not fair.

Our interviews, as well as written comments of employees on the questionnaires, disclose that employees feel that promotions are not fair because they are not given a chance to compete for jobs which should be open to competition. Employees voiced the views that promotions are "rigged"and that some vacancies were advertised after the selection was made,

or not at all.

32. The "PERSONNEL MANAGEMENT EVALUATION REPORT" for MARAD for 1978, based on the interviews of 25 employees across the entire managerial, supervisory, non-supervisory, technician, and clerical occupation area, states in pertinent part under the heading MERIT STAFFING that:

> Employees were united in criticism of the merit promotion and staffing process. In the first place, almost all of them had not seen a copy of the merit promotion plan but were aware that something did exist, which governed the merit process. There was, however, very little credibility in the system. To a person employees believed the system was fixed -- that all selections were pre-arranged, and were based on non--merit factors.

This report also states on p. 1 that:

> The findings of the team were similar, in many respects, to the findings of the review conducted in 1977.

33. Certain personnel are frequently used as raters, whereas certain other professionals such as the plaintiff are never asked to serve even in such cases

where Ms. Ruegamer, the Personnel Specialist, performed as a rater even for GS-14 engineers.

34. Ms. Ruegamer, with only a high school diploma, is totally unqualified to rate engineers, especially those for grade levels higher than hers. Further, her direct participation in the scoring under V.A. 95-VWR-75, which is described as a prima facie case of preselection in a personnel management evaluation, is indicative of the true process and direct involvement of the Personnel Office. Ms. Ruegamer's preparation of the contents for and issuance of the vacancy announcements, without review, and her preparation of the selection criteria and rating points for the panels without qualification to do so, further shows the process to be without merit.

35. MARAD persisted in the hiring of

preselected individuals through manipulation of MPP procedures and the non-advertised (or publicized) promotions after exposure of such practices in the PME investigative reports.

36. The lack of credibility in the MARAD administration of the Merit Promotion Program with respect to the use of vacancy announcement procedures is further demonstrated by the apparent preselected hire of at least six of Mr. Pitkin's coworkers from his former employer at high grades and steps with substantial increases in income in contrast to the decrease in income for the plaintiff. The hire of these individuals from an aircraft company (Martin Marietta) with little, if any, marine experience in a short span of time could only reasonably be done through the use of rigged promotion panels, especially in view of the fact that an outside applicant must

be the most highly qualified. Mr. Pitkin used competitive vacancy announcements only for the recruitment of outside engineering personnel at the GS-15 level up to the date of the complaint, i.e., no engineer under Mr. Pitkin was selected for such promotion through one of his vacancy announcements, whereas numerous individuals were recruited from outside. The rehire of Mr. Pross on 11/10/64, immediately after his employment on a political campaign was done without a vacancy announcement. The position advertised under 633-VWR was basically plaintiff's position, which was given to a much younger individual, Mr. Seibold, at a higher grade and pay. Also, Mr. Pross' assignment to a supervisory position as Chief, Division of Foreign Cost, from a non-supervisory position without an advertised vacancy announcement was in violation of the regulations.

37. The artificiality of MARAD's practice for selecting engineers under vacancy announcements is shown by the fact that the criteria and point allocations as done by Ms. Ruegamer, are normally adopted by panel members and show the criteria to be clearly weak, highly subjective, not representative of the position descriptions, and to defy quantification from such data that is normally contained in an SF-171. The SF-171 is the "principal document" for rating candidates.

38. The random use of criteria is well illustrated in the comparison of the criteria used for filing the position of Chief of Production as it was advertised under Vacancy Announcement 13-VWR-75 and as it was advertised 14 months earlier under Vacancy Announcement 138-VWR-74 which used the same position description. Further, the criteria,"meet and deal effectively..."

used in 138-VWR-74 was later used also in 148-VWR-75. How this latter quality could be quantified for each applicant from a SF-171 or any other available document is not explained by the defendant. The PME-Merit Promotion Actions, dated June 24, 1977 states in pertinent part in the memorandum that "Vacancy announcements and rating plans for higher graded jobs often lack sufficient detail for the panel's or the candidate's guidance." Mr. Frye, in response to questions on the meaning of the criteria, stated that they were "just words."

39. The fact that the rating scores given to the applicants for the various criteria are mainly a contrivance is further illustrated, by way of example, by McGowan's testimony in which he states that:

To my knowledge, Mr. Forbes had never been

involved in the field of shipbuilding costs. To my knowledge, he was more in the engineering category of work and had never done ship cost estimating in any form, that I was aware of.

Yet he gave Mr. Forbes 15 points, as compared to 5 points to the plaintiff. Further, the plaintiff usually received disparately lower scores for education and training and awards which are clearly the most objective and quantifiable of the "criteria." Comprehensive worksheets are lacking that would show that the scores were derived in any systematic way. A further example of the manipulation in the scores for applicants is illustrated in the scores given to Mr. N. Hammer (Applicant D) under Vacancy Announcement 138-VWR-75 under which Mr. Cherrix was selected on January 12, 1976, compared with the corrected scores given to Mr. Hammer under Vacancy Announcement 148-VWR-75 on which Mr. Cherrix (Mr. Hammer's supervisor) served as

a rater on January 22, 1976, only ten days later.

40. The manipulations of the scores to achieve the desired results is further demonstrated by the change in the score of Mr. Critelli by one point to allow his selection as an outside applicant under Vacancy Announcement 634-VWR. As only one example, scores for Messrs, Davis, Karlson, and Schimler were all clearly increased after the scoring was totaled, which resulted in their placement on the highly qualified list for Vacancy Announcement 139-VWR-75. The lack of any computer training for Karlson and the recorded computer training of the plaintiff should have favored the plaintiff in the scoring instead of Mr. Karlson. Also, the only applicant (Mr. J. Davis) to be considered for the position of Chief, Division of Production, General Engineer GS-801-15,

under both Vacancy Announcement 138-VWR-74 (Applicant B) and, 14 months later, under Vacancy Announcement 139-VWR-75, received 57 and 70 points, respectively, in spite of the fact that Mr. Davis had not worked in engineering since 1971. Mr. Frye was a rater for both vacancy announcements.

41. The analysis of the scores given for supervisory appraisals for Vacancy Announcement 139-VWR-75 clearly reveals no significant correlation between the scores given by the raters and the number of checks for "true of him" made by the applicant's supervisor on the Qualifications Analysis and Assessment of Potential for Supervisory Positions form. This scoring, which appears to be largely random, for a criterion that is quantifiable, has a large amount of raters and inconsistencies between the raters, quite unlike that for the final total

scores. This further illustrates that the process is artificial and contrived. The data also shows that older personnel generally receive fewer "true of him" check marks. Also, the Qualifications Analysis and Assessment of Potential for Supervisory Positions Form 718 have the identical list of "importance of ability" for the listed "supervisory abilities and traits" for each of the different positions shown in the record. The fact that this list (Column A) is pre-filled-out on the form, regardless of differences in the requirements of the different positions and contrary to the instructions on the form itself, adds to the artificiality of the process.

42. Mr. Nachtsheim's statement that he only received a list of highly qualified candidates is not in agreement with either Ms. Ruegamer's testimony in which she refers to attachments to the certificate,

or Mr. Higgins' testimony in which he states that the selecting official is presented with both the list of highly qualifieds and qualifieds and that the selecting officials can pick from either list.

43. Mr. Pitkin's explanation that the reasons for the transfer of the (second) highly skewed propeller program (with American Export Lines) was because of Mr. Dashnaw's transfer out of the Office of Maritime Technology, does not agree with the date on the document in which the COTR names were switched, compared with the plaintiff's transfer which was in 1974.

44. Little in the way of expressed indications of discrimination are to be expected in the documents because of MARAD's concerted efforts to keep any such written material out of the records as illustrated by MARAD Bulletin No. 77-91 re

Supervisory Industrial Specialist, GS-1150-15.

(b) Mr. Schubert gave Mr. Karlson the minimum score for awards, 5 points, and

> By contrast, Mr. Dashnaw had no record of any awards and therefore received zero points.

This is contrary to the record.

(c) Mr. Schubert gave Mr. Karlson 16 points out of 20 for the criteria "General Knowledge of Marine Industry" as compared to 10 for the plaintiff, despite the fact that Mr. Karlson had never worked in the Division of Production, had no production or industrial engineering related experience or training, and had not worked in an engineering position since October 17, 1971, all of which compares unfavorably with plaintiff's background.

(d) Mr. Schubert gave Mr. Karlson 16 points (one of the numbers that appears to have been changed on his rating sheet), as compared to 5 points for the plaintiff. This was allegedly based on Mr. Karlson's assignment with an estimates group in the Office of Ship

Construction when he was a GS-9 and when he was assigned to a shipyard as a trainee for six months as a GS-5, which can hardly be considered highly qualifying experience for a GS-15 level position. The defendant does not show that Mr. Karlson's non-technical assignment as Domestic Shipping Specialist, Division of Inland Waterways Shipping, since October, 17, 1971, is in any way connected with ship production. In fact, the mission assignment for that division shows that it is not so connected.

(e) In comparison, the plaintiff has worked with shipyard personnel on the development of new and innovative ship components such as the highly skewed propeller at the GS-14 level.

(f) For the criteria "Computer Systems Knowledge," Mr. Schubert gave Mr. Karlson 8 points and zero points for the plaintiff. The OPF Summary for Mr. Karlson shows no computer training, whereas the resume of the plaintiff does show training under Industrial and Military

courses.

(g) Moreover, Mr. Schubert downgraded plaintiff without adequate knowledge of his work and ignored plaintiff's shipyard experience.

49. Mr. Pitkin contended that the "reorganization" involving the forced transfer of the plaintiff, was to avoid RIF's. However, the required reduction (adjustment) in the ceiling for the number of allowable personnel was simply accomplished by a corresponding reduction, on paper, of the number of unfilled billets.

50. There are no facts to show that the plaintiff had any problem working with any of his associates. The plaintiff specifically testified that he had no problem with respect to Mr. Seibold, notwithstanding the alleged discriminatory hire of Mr. Seibold and the transfer of the plaintiff's work to him. There is no testimony from anyone allegedly directly involved.

51. Additional facts relating to the Pross

selection under Vacancy Announcement 36-VWR-76 include the following:

(a) The new position description N-76-1-148 contains numerous identical groups of wording as are in Mr. Pross' previous position description, 574-1-125 as determined by a line--by-line comparison. This strongly suggests that Mr. Pross was intended to be placed in the position and retain the foreign travel responsibilities, with some of the other duties which are now in both position descriptions.

(b) The ratings for performance appraisals bear no comparison with the check marks on the Qualification Analysis and Assessment of Potential for Supervisory Positions as submitted by the supervisors of the applicants as given in defendant's exhibit 59. Mr. Pross received only 10 "true of him" check marks and 22 "more true than false of him" check marks and received a total of 65 points from the raters. In comparison, the plaintiff was given 15 and 16 checks, respectively, and was given only 50

trainee of both the selectee and the selecting official, served on the panel although he was only a GS-15.

(i) Mr. Frisch was given a high total score, higher than the plaintiff, for supervisory evaluation although none was submitted for him.

(j) The most recent SF-171 in Mr. Karlson's file preceded his employment by MARAD and is dated 7/2/58. No meaningful merit information can be obtained from this SF-171.

(k) The affidavits of the raters show that they used "personal knowledge" in the rating process and were well acquainted with the selectee.

(l) The plaintiff's SF-171 dated October 20, 1969 that was in the plaintiff's Official Personnel Folder was not reviewed with any thoroughness in view of the numerous misstatements in the raters'

affidavits. The plaintiff's updated SF-171 dated July 9, 1973 apparently was lost and was not in the file.

(m) Mr. Higgins conceded the correlation with age.

48. Mr. Schubert was selected at an early age for a GS-15 level position by Mr. Kiss. A further examination of the ratings of Mr. Schubert (GS-15) as described in this affidavit shows that he was a fellow former trainee of the selectee, shared a peer relationship with Mr. Kiss, and had no previous relationship with the Division of Production except through organizational interfaces. Mr. Schubert's ratings also show the following disparate award of points for education and training:

(a) Mr. Schubert, relative to the criteria, "Supervisory Ability/Potential Management," gave Mr. Karlson 20 out of 25 points, as compared to 10 points for the

plaintiff in which he emphasized Mr. Karlson's being a division chief in the Office of Domestic Shipping, which is a small non-technical office. He further stated that plaintiff had "only minor supervisory responsibility at an arsenal." This overlooks both plaintiff's higher engineering manager (executive level) position at Chrysler Corporation and his specific education, B.S. in Management Engineering with Electrical Engineering minor and M.S. in Engineering, both of which are from industrial engineering college departments and which are directly and highly relevant to the position. The plaintiff's Master's degree in Metallurgical Engineering is also highly relevant to the production of ships which involve the use of steel and other metal alloys. The position, as advertised, was for a Supervisory General Engineer, GS-801-15, or Super-

visory Industrial Specialist, GS-1150-15.

(b) Mr. Schubert gave Mr. Karlson the minimum score for awards, 5 points, and

By contrast, Mr. Dashnaw had no record of any awards and therefore received zero points.

This is contrary to the record.

(c) Mr. Schubert gave Mr. Karlson 16 points out of 20 for the criteria "General Knowledge of Marine Industry" as compared to 10 for the plaintiff, despite the fact that Mr. Karlson had never worked in the Division of Production, had no production or industrial engineering related experience or training, and had not worked in an engineering position since October 17, 1971, all of which compares unfavorably with plaintiff's background.

(d) Mr. Schubert gave Mr. Karlson 16 points (one of the numbers that appears to have been changed on his rating sheet), as compared to 5 points for the plaintiff.

This was allegedly based on Mr. Karlson's assignment with an estimates group in the Office of Ship Construction when he was a GS-9 and when he was assigned to a shipyard as a trainee for six months as a GS-5, which can hardly be considered highly qualifying experience for a GS-15 level position. The defendant does not show that Mr. Karlson's non-technical assignment as Domestic Shipping Specialist, Division of Inland Waterways Shipping, since October, 17, 1971, is in any way connected with ship production. In fact, the mission assignment for that division shows that it is not so connected.

(e) In comparison, the plaintiff has worked with shipyard personnel on the development of new and innovative ship components such as the highly skewed propeller at the GS-14 level.

(f) For the criteria "Computer

Systems Knowledge," Mr. Schubert gave Mr. Karlson 8 points and zero points for the plaintiff. The OPF Summary for Mr. Karlson shows no computer training, whereas the resume of the plaintiff does show training under Industrial and Military courses.

(g) Moreover, Mr. Schubert downgraded plaintiff without adequate knowledge of his work and ignored plaintiff's shipyard experience.

49. Mr. Pitkin contended that the "reorganization" involving the forced transfer of the plaintiff, was to avoid RIF's. However, the required reduction (adjustment) in the ceiling for the number of allowable personnel was simply accomplished by a corresponding reduction, on paper, of the number of unfilled billets.

50. There are no facts to show that the plaintiff had any problem working with any of his associates. The plaintiff

specifically testified that he had no problem with respect to Mr. Seibold, notwithstanding the alleged discriminatory hire of Mr. Seibold and the transfer of the plaintiff's work to him. There is no testimony from anyone allegedly directly involved.

51. Additional facts relating to the Pross selection under Vacancy Announcement 36-VWR-76 include the following:

(a) The new position description N-76-1-148 contains numerous identical groups of wording as are in Mr. Pross' previous position description, 574-1-125 as determined by a line-by-line comparison. This strongly suggests that Mr. Pross was intended to be placed in the position and retain the foreign travel responsibilities, with some of the other duties which are now in both position descriptions.

(b) The ratings for performance

appraisals bear no comparison with the check marks on the Qualification Analysis and Assessment of Potential for Supervisory Positions as submitted by the supervisors of the applicants as given in defendant's exhibit 59. Mr. Pross received only 10 "true of him" check marks and 22 "more true than false of him" check marks and received a total of 65 points from the raters. In comparison, the plaintiff was given 15 and 16 checks, respectively, and was given only 50 total points. It is also noted that Mr. Pross received no "true of him" checks for "1. Supervisory Abilities." This further demonstrates the contrived nature of the ratings in addition to the identical total points given by two of the raters to each of the three highly qualified applicants following their discussion with the selecting official, Mr. Nachtsheim.

(c) The fact that Mr. Pross had no

updated SF-171 in his file since his date of hire also suggests that he was preselected.

52. Additional facts indicating lack of a legitimate, nondiscriminatory reason for the selection of Mr. Hammer under Vacancy Announcement 148-VWR-75 are as follows:

(a) The reasons for the selection of Mr. Hammer as set forth on the certificate by Mr. Kiss is at complete variance with both the rating criteria and the position description. This exhibit also shows that Mr. Hammer had virtually no management training or experience in comparison with the extensive credentials of the plaintiff.

(b) Three of the four personnel listed on the certificate were also on the certificate for 139-VWR-75, of whom Mr. Karlson was the selectee.

(c) Score changes also appear to have

been made in this case after the scores were totaled with several incorrect additions.

(d) Both Messrs. Hammer (selectee) and Pross (rater), as well as Mr. Kiss (selecting official) are members of the group of former fellow trainees.

(e) Mr. Hammer had never worked in an engineering position before this selection.

(f) The evaluation criteria do not reflect any of the requirements set forth in the position description. Mr. Kiss' intent to select Mr. Hammer, who is one of the three young former fellow trainees that he selected, is reflected on page 2 of his affidavit of 1/18/77, in which he states:

> Although the position that he was chosen for is that of General Engineer, I was looking for someone who had a background strength in naval architecture. He was the one with the most recent type of background who was on the certificate list so I already had him in mind for the position before I conducted the interviews with an of the candidates (emphasis the Court's).

This statement is at variance with the position as advertised.

(g) Based on the affidavit dated 7/15/76 of Mr. Pross, it appears from his statements that he did not even read the SF-171 of the plaintiff based on his erroneous statement that the plaintiff had only a B.S. degree and that he had no awards. However, it does show that he talked to Mr. Kiss, the selecting official, the reason for which is not clear. Mr. Kiss does not admit to this in his affidavit but states: "Prior to the meeting of the rating panel, my sole endeavor was to call the Office of Personnel to establish who had applied for said position."

(h) Mr. Pross' statement, "my higher rating of Mr. Hammer as opposed to my lower rating of Mr. Dashnaw was as a result of a review of each of their records" is quite at variance with his other statements that

stress personal knowledge and personal contacts and the obvious patterns of preference shown in the ratings.

53. Additional facts which demonstrate the lack of a legitimate, non-discriminatory reason for the selection of Mr. Schimler under Vacancy Announcement 86-VWR-76 are:

(a) The fact that Mr. Pross had no costing experience when he was given this same position OPF Summary, 65 is inconsistent with the heavy demand for costing experience, especially since the position is advertised as a supervisory general engineer and not cost estimator.

(b) Following Mr. Schimler's discussion on promotion possibilities with Mr. Nachtsheim which seems like a rather clear understanding, and the fact that he is a schoolmate of the selecting official, Mr. Pross, and a former fellow trainee of both

Mr. Pross and Mr. Kiss (a rater) and the youngest applicant, all strongly suggest that he was preselected.

(c) Mr. Nachtsheim's general instructions "to pick people who have potential to grow into higher level jobs", rather than picking personnel with proven experience, is youth-oriented.

IV

The Court concludes as a matter of law that the defendant discriminated against the plaintiff because of the plaintiff's age at the time the plaintiff applied for the four positions at issue in this case. The record establishes that age was a determining factor in the non-promotion of the plaintiff. The plaintiff is now entitled to have his records amended to reflect his promotion, and the back pay he is entitled to receive. Plaintiff is also entitled to an award for attorney's fees

and costs.

Plaintiff is to submit, a proposed order consistent with this memorandum within 15 days.

April 2, 1988 /s/JOHN GARRETT PENN
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS J. DASHNAW,
Plaintiff

V.

SECRETARY OF COMMERCE
Defendant

FILED
September 11, 1989

Civil Action
No. 77-1342

MEMORANDUM ORDER

This comes before the Court on the plaintiff's Motion for Specific Equitable Relief. The motion is opposed by the defendant.

I

Plaintiff request that the defendant be ordered to promote him to the appropriate step of GS-0801-15 effective two years prior to the date the plaintiff filed his first administrative complaint and that the defendant amend the records accordingly. While the defendant concedes that plaintiff would be entitled to recover back pay for

two years preceding his submission of an administrative complaint upon proving a continued denial of promotions, defendant argues that "there is no persuasive evidence ... that plaintiff was denied a specific promotion during the period." Defendant's Memorandum in Response to Plaintiff's Motion for Specific Equitable Relief (Defendant's Memorandum) at 9. This Court disagrees with the defendant.

The plaintiff's administrative complaint of April 8, 1976 referred to "the non-promotion of the plaintiff as a career promotion because of age and the specific selections of Messrs. Karlson and Hammer under Vacancy Announcement Nos. 139-VWR-75, and 148-VWR-75." Court's Memorandum filed April 4, 1988 (Memorandum), par. 5. The Court also found that when the plaintiff was hired by the Maritime Administration in September 1967, it was at a "substantial

reduction in income based on the understanding that he would be promoted to the GS-15 level as soon as the planned expansion of the R&D program went into effect." Memorandum, par. 8. Furthermore, the Court found that the plaintiff made "repeated and unusual efforts to be promoted", but that younger personnel were promoted to GS-15 positions "without any significant change in their duties and without competition." Memorandum, par. 17(a). "The defendant failed to rebut the fact that the plaintiff should have been promoted through this same means up to the present time to receive equitable treatment." Id. Notwithstanding the efforts of the plaintiff, he was not promoted. Based upon the above findings, the Court concludes that the plaintiff is entitled to a retroactive promotion effective two years prior to the filing of his first administrative complaint.

II

The second issue raised by plaintiff's motion is whether the plaintiff was constructively discharged from his job in 1982.

The record reflects that plaintiff was separated from his position on or about June 30, 1982.

The two principal cases relating to constructive discharge in this context are Hopkins v. Price waterhouse, 263 U.S.App. D.C. 321, 825 F.2d 458 (1987), reversed on other grounds, 109 S.Ct. 1775 (1989); Clark v. Marsh, 214 U.S.App.D.C. 350, 665 F.2d 1168 (1981). Before addressing the question of constructive discharge in the instant case, the Court will briefly refer to the facts in those cases.

In Clark, the Court of Appeals, in upholding the trial court's determination that the complainant had been construc-

tively discharged, noted that:

> Plaintiff does not claim only a single instance of nonpromotion, or even simply a period of nonpromotion. Instead she alleges, and the district Court found, a continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training, existing over a period of years. Moreover, unlike the plaintiff in Bourque [Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61(5th Cir. 1980)), Clark did not knowingly enter a discriminatory environment. The district court explicitly found that Clark reasonably expected that her participation in the Career Program would provide numerous opportunities for advancement, and that she "vigorously pursued" such opportunities.

214 U.S.App.D.C. at 356, 665 F.2d at 1174. Clark had started with the Army in 1950 as a clerk-typist and had risen to Deputy Director of her office. In December 1976, following the death of the Director, she became Acting Director of her office and when another person, who lacked supervisory experience, was appointed as Director, Clark resigned four days thereafter.

The facts in Hopkins are somewhat

similar. Hopkins sought, but never received, an appointment as a partner, and when it became clear that she was unlikely to receive such an appointment, she resigned. The Court of Appeals observed in concluding that Hopkins was the victim of a constructive discharge that:

> We continue to adhere to the view, first set forth in Clark, that the mere fact of discrimination, without more, is insufficient to make out a claim of constructive discharge, Similarly, we believe that discrimination is still best attacked within the context of existing employment relations. Price Waterhouse's decision to deny Hopkins partnership status, however, coupled with [its Office of Government Service's] failure to renominate her, would have been viewed by any reasonable senior manager in her position as a career ending action. Accordingly, it amounted to a constructive discharge.

263 U.S.App.D.C. at 336, 825 F.2d at 473.

Turning to the facts of the instant case, there is no question but that the record and the findings demonstrate that the plaintiff was hired by the Maritime Administration as a GS- 801-14 at a sub-

stantial reduction in salary, but with the understanding that as soon as the planned expansion of the Research and Development program went into effect, he would be promoted to GS-15. Memorandum, par. 8. Thereafter, he pursued advancement and made a number of attempts to be promoted, all unsuccessful. With that history, all as is set forth in the Memorandum filed in this case, the plaintiff has presented a strong case for constructive discharge.

The defendant has filed declarations seeking to show that although there was a reduction in force (RlF) taking place in 1982, the plaintiff had bumping rights, due to his Veteran's Preference, and could have been placed in a GS-14 position occupied by Robert Schaffran, a non-veteran. Turanin Declaration, par. 3. Defendant notes that the plaintiff was offered the GS-14 position but declined to take the lateral

transfer, electing instead to retire under the early out provisions because of "involuntary separation." Id., par 4. In order to accomplish the "involuntary separation", plaintiff had requested that his position be abolished. Id., par. 2. Finally, the defendant notes that after plaintiff left the position, Schaffran was given a temporary promotion to a GM-15 position in June 1982, and that the promotion was made permanent in April 1984. Id., par. 5.

Defendant's argument suggests that had the plaintiff exercised his bumping right, he would have been a GM-15 by June 1982. But the fact is that there is nothing in the record which suggest that plaintiff separated from service after having been advised that he would be promoted to the GM-15 position. In fact, it appears that even as late as 1982, he expected that he would remain in the Grade 14 position. In

other words, the plaintiff had no reason to believe that his status would have changed even if he exercised his bumping right. Under these circumstances, it is understandable that the plaintiff decided to accept termination since a reasonable person would have concluded that all he could have expected was more of the same, and that reasonable person would have concluded that those working conditions were intolerable. The Court concludes based upon those facts that the plaintiff was constructively discharged from his position.[1]

In sum, the Court concludes that the plaintiff was constructively discharged

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[1] It is noted that the plaintiff states in his declaration that throughout this period of time he was sitting at his desk with nothing to do and that he found this to be repugnant. Plaintiff declaration, par. 9. But the Court has not considered that allegation in concluding that the plaintiff was constructively discharged.

from his position in 1982 and therefore is entitled to back pay after that date. The Court does not, however, rule as to the date plaintiff entitlement to back pay would have ended, but will leave that to the parties to attempt to settle.

III

Plaintiff also argues that he should be promoted to Grade 16 and that he should be placed in the position vacated by Mr. Pross as Associate Administrator of the Shipbuilding and Ship Operations. After giving careful consideration to this request, the Court concludes that it must be denied. Whether the plaintiff would have been promoted to a Grade 16 is subject to speculation. As the defendant points out, promotion under the old Senior Level or the current Senior Executive System requires approval of the Office of Personnel Management, formerly the Civil Service System

Commission. Turanin Declaration, par. 6. Under these circumstances this Court cannot find that the plaintiff would have been promoted to that grade or that position. This much of plaintiff's motion must be denied.

IV

In sum, the plaintiff's motion is granted in part and denied in part. The Court will enter an order directing that the defendant promote the plaintiff retroactively to step GS-0861-15, effective two years prior to the date the plaintiff filed his first administrative complaint. The Court will also direct the defendant to reinstate the plaintiff, provided that the plaintiff still seeks reinstatement. With respect to the plaintiff's request that the Court find that the plaintiff was constructively discharged, the Court so finds. However, while that finding requires the

defendant to pay additional back pay to the plaintiff, the Court does not direct when the period of the back payment should end. This issue is left to the parties to discuss and settle, if possible. The Court rejects plaintiff's claim that he should be promoted to Grade 16 or that he should be placed in the position formerly occupied by Mr. Pross. The defendant should make the appropriate adjustments for annual leave, sick leave and administrative leave. Finally, the Court concludes that plaintiff is entitled to reasonable attorney's fees and costs.

The parties shall meet to determine whether they can resolve the issue of back pay, and perhaps the case. If not, the plaintiff shall submit a proposed order consistent with this Memorandum Order. With respect to the issue of the amount of back pay, plaintiff shall set forth its

request, together with the grounds in support thereof; and defendant shall have 14 days within which to respond.

On or before October 13, 1989, the plaintiff shall submit his proposed final order, or in lieu thereof, a statement setting forth the reasons why the proposed order cannot be submitted at that time. Defendant shall have 14 days thereafter within which to respond. The parties are encouraged to attempt to settle these issues.

It is hereby

ORDERED that plaintiff's motion is granted in part and denied in part as set forth above, and it is further

ORDERED that plaintiff's motion for the award of back pay is granted, defendant to pay back pay effective two years prior to the filing of plaintiff's first administrative complaint, and back pay based upon

the Court's determination that the plaintiff was constructively discharged from his position, and it is further

ORDERED that plaintiff's motion that he be promoted to Grade 16 and be placed in the position vacated by Mr. Pross is denied, and it is further

ORDERED that defendant shall pay plaintiff reasonable attorney's fees and costs, and it is further

ORDERED that plaintiff shall submit his proposed final order on or before October 13, 1989, and that defendant shall file his response on or before 14 days of the date of the plaintiff's submission.

Sept. 11, 1989 /s/JOHN GARRETT PENN
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
May 11, 1992

FRANCIS J. DASHNAW,
Plaintiff

V.

Civil Action
No. 77-1342

SECRETARY OF COMMERCE
Defendant

ORDER

Pursuant to the decision filed in this case, it is hereby ORDERED that the defendant shall:

1. Retroactively promote the plaintiff to the appropriate step of GS-0801-15, effective the beginning of the appropriate pay period two years prior the date, September 12, 1975, when the plaintiff filed his first administrative complaint, and shall amend the records the reflect the above action.

2. Amend the plaintiff's records to

show reconstructed continuous service from the date of discharge, June 29, 1982, through to the date of his reinstatement.

3. Pay the plaintiff back pay in accordance with the above, however, plaintiff shall not be entitled to monetary interest under the provisions of the Civil Rights Act of 1991.

5. Pay plaintiff as though he had been reinstated as of the date of this order provided, however, that defendant shall have 60 days within which to take discovery into plaintiff's efforts to mitigate his damages.

6. Pay reasonable attorney's fees and cost and restore both the 30 days annual leave that was used by the plaintiff in the prosecution of this case and the unused sick leave and annual leave remaining at the time of his discharge. Plaintiff may update his motion for attorney's fees and

costs within 15 days of the date of this order. Defendant shall respond to the motion within 45 days of the date plaintiff files his update of his motion or files a statement that he will not update his motion. Plaintiff may reply to defendant's response provided that any response is filed within 20 days of the date that defendant files his response.

MAY 8, 1992

/s/JOHN GARRET PENN
Chief Judge

Appendix E

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5274
(Consolidated with 92-5256)
(C.A. No. 77-1342)

FRANCIS J. DASHNAW,
Appellee (Cross-Appellant)

v.

Secretary of Transportation
Appellant (Cross-Appellee).

On Appeal From The United States District Court For The District of Columbia

PETITION FOR REHEARING, HEARING EN BANC

Concise Statement of Issues and Their Importance

This case, decided January 7, 1994, should be reheard or heard en banc for the following reasons:

(1) the panel opinion contains serious errors of law and fails to consider Mr. Dashnaw's evidence and arguments;

(2) the panel opinion is inconsistent with the panel opinions in Clark v. Marsh,

665 F.2d 1168 (D.C. Cir. 1981) and Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir 1987); and

(3) the panel opinion involves questions of exceptional importance to the difficult and recurring areas of constructive discharge and rightful place.

Mr. Dashnaw requests a review limited to the rulings on the issue of sufficiency of evidence on constructive discharge and the issue of tracking the promotion history of the discriminatorially selected individual. For the reasons given below, Mr. Dashnaw requests that the District Court's ruling on the issue of constructive discharge and reinstatement be either upheld or that issue be remanded back to District Court for appropriate findings on the remaining aggravating factors in the record and that Mr. Dashnaw be allowed to track the promotion history of the chosen discr-

iminatorially selectee for equitable relief.

Sufficiency of Evidence of Constructive Discharge

Mr. Dashnaw submits that the panel made the following errors in its reversal of the District Court's ruling that he had a strong case of constructive discharge:

I. The panel was in error in finding that the record is insufficient to support a constructive discharge claim. See Bishopp v. District of Columbia, 788 F.2d 781, 785 (D.C.Cir. 1986). The finding is inconsistent with both the facts and the law. Mr. Dashnaw was exposed to numerous aggravating and humiliating factors with intentional infliction of emotional distress with knowing egregious abuse of power leading to and including the involuntary separation/constructive discharge.

It is unrefuted that Mr. Dashnaw was

the only agency employee involuntarily separated in 1982 after his job and his job alone was abolished and after he refused an unidentified lateral position having no identified position description or duties. The abolishment of his position followed the unrefuted fact that Mr. Dashnaw was the only professional who did not receive any new assignments or funding support for the upcoming 1983 fiscal year and lack of any response to his repeated requests for new assignments ... His belief that it would be destructive to him being isolated in a room without windows with no work to do was reasonable ... . These facts would lead any reasonable professional to accept termination.

The humiliating forced transfer of Mr. Dashnaw, resulting in his being placed under a non-supervisor of lesser age, experience, and training, with predictable

humiliation and loss of prestige, triggered the first of four administrative complaints (which preceded the complaints of discrimination on the four non-selections) ... This unrefuted forced transfer and layering of Mr. Dashnaw would, alone, cause a reasonable professional person to quit. Similarly, (see J.A. 261-62) which recognized that "if they did not resign ... this "layering technique", followed by a reduction in force after a respectable waiting period, was the technique used ....". This practice is remarkably similar to that in the instant case which remained uncorrected to the date of Mr. Dashnaw's involuntary separation and supplements the practice of transferring of projects developed by Mr. Dashnaw to others ...

These career ending circumstances followed many years of discriminatory denial of promotion despite promises of

promotion prior to hire in 1967 ... in the face of preselected hirings ... and other aggravating factors that contributed to the intolerable and humiliating conditions cited in the record ...

Some of the other aggravating factors in the record and cited in Mr. Dashnaw's briefs include: verbal and physical assaults on Dashnaw in the presence of others when he complained that he may have been discriminated against ...; other assaults; the alarming threat of being worked over with a baseball bat that was made to Dashnaw in the presence of his colleagues shortly before trial ...; degrading comments and warnings to others to stay away from Dashnaw; the continuing pattern of transferring projects developed by Mr. Dashnaw to less experienced personnel at higher grade and pay who had little or no R&D experience; discouraging and making it

impossible for Mr. Dashnaw to continue professional participation in professional societies; and, the inappropriate questioning of Dashnaw on the status of his case on nearly a daily basis ..., among others.

The above unrefuted factors and conditions along with the testimony at trial that MarAd supervision made working conditions intolerable for older employees (see Brief For Cross-Appellant/Appellee at 22) with the pattern of flushing out older personnel because of a perceived "age problem"[1] ... would surely lead any reasonable person to conclude that such conditions were intolerable and would be driven to quit and supports that conclusion of District Court.

The District Court concluded that the

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[1] This was reflected in a successful effort to reduce the average age by 20 over five years. J.A. 133.

sufficiency standard was met as set at that time in the cited precedent cases of Hopkins v. Price Waterhouse, 263 U,S. App. D.C. 321, 825 F.2d 458 at 473 (1987), and Clark v. Marsh, 214 U.S. App.D.C. 350, 665 F.2d 1168 at 1174 (D.C. Cir. 1981) on which it relied in its conclusion that the instant case was a strong case of constructive discharge .... The aggravating factors in the instant case are clearly more severe than those cited in Hopkins and Clark. Any dispute on the sufficiency of evidence should have been remanded back to District Court for appropriate findings in fairness to Mr. Dashnaw.

II. The panel erred on reversing the District Court's ruling on constructive discharge in its one paragraph which does not show that a fair consideration to the facts and arguments presented by Mr. Dashnaw was given. The panel did not draw

any distinction between the holdings in *Hopkins* and *Clark* and the instant case or support its conclusion that the lower court was in error. Mr. Dashnaw submits that Hopkins' quitting after being told that she would not be promoted (make partner) and it being upheld as a constructive discharge is much less severe by way of an aggravating factor than that experienced by Dashnaw who, as the record shows, was repeatedly promised a higher grade even before hire in 1967 but instead was strung along and never promoted to date of discharge in 1982. The aggravating factors that support a ruling of constructive discharge in *Clark*, which are surprisingly similar to some of those in the instant case, also fall short in severity to that of the instant case.

III. The panel was in error in redeciding the case without considering the retaliatory motive/conduct of the agency to

drive Mr. Dashnaw to accept termination ... The facts of the instant case commencing with the assault on Mr. Dashnaw in 1975 through denial of new assignments, abolishment of job and his discharge, with other actions and conditions cited above, strongly support an inference of retaliatory motive/conduct. Such conduct should be viewed in favor of Mr. Dashnaw using the current standard of proof and the other facts in the record. As pointed out in *Harvis v. Roadway Exp. Inc.*, 973 F.2d 490 (6th Cir. 1992), at 497, in following *Carter v. South Cent. Bell*, 111 S.Ct. 2916, (1991), it would be pointless to determine whether the employer's motive was to retaliate or "merely" discriminate. "Both motives are equally invidious, and the employee suffers the same harm." Later, the Supreme Court elucidated further burden shifting guidance in *Price Waterhouse v.*

Hopkins, 109 S.Ct., at 1787-8 (1989), where the Court states:

> We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability[10] only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights. Our holding casts no shadow on *Burdine*, ... Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on the other. [citations and footnotes omitted]

The agency in the instant case did not make such an affirmative defense and only later, on appeal, asserted full reliance on the claim that the plaintiff did not file notice on the constructive discharge issue (see Oral Arguments) which was not upheld by the panel. See Bishopp v. District of Columbia, supra.

IV. The panel erred in redeciding the issues rather than remanding it back to the

trier of fact, for further consideration of areas of dispute. The panel's claim that "We also find that the record is insufficient to support a constructive discharge claim" is inconsistent with the facts. The District Court did find aggravating factors beyond non-promotion and the record is replete with such evidence.

The panel was in error in not considering the fact that the defendant agency (MARAD) is a proven discriminator with respect to age discrimination in Whitcher v. Dept. of Transportation, (D.C. 1985), C.A. 84-1059, Order of Feb. 13, 1985, and of race discrimination in Harrison v. Lewis, 559 F.Supp. 943 (D.D.C. 1983). A proven discriminator should bear a higher burden of proof. See Milton v. Weinberger, 696 F.2d 94 (D.C.Cir. 1982).

Tracking of Promotion History of Chosen Selectee

Mr. Dashnaw submits that the panel made the following errors in ruling that his argument ... that he should have been further promoted is without merit:

1. The panel erred in accepting the District Court's unreasoned conclusion that the further promotion of Mr. Dashnaw would be a speculation.

2. The panel erred in not considering the precedent in the circuit, and other circuits, that equitable relief to a prevailing plaintiff should include the tracking of the promotion history of a discriminatorially selected selectee.

3. The panel erred in not adhering to the guidance of the Supreme Court that equitable relief for a prevailing plaintiff should include his/her placement in his/her rightful place which can only be done in

the instant case by the tracking of the promotion history of a discriminatorially selected selectee over the years.

CONCLUSION

The panel decision in this case contains serious errors of law. Moreover, the panel decision is in conflict with previous decisions of this court. Therefore, the case should be reheard by the panel or heard en banc.

Respectfully submitted,
/s/Joel P. Bennett
Law Offices of Joel P. Bennett, P.C.
1208 Eton Court, N.W.
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Attorney for Mr. Dashnaw
Appellee, Cross-Appellant

Appendix F

United States Court of Appeals
For The District of Columbia Circuit

No. 92-5274 **September Term, 1993**
USDC CV 77-1342

Francis J. Dashnaw

v.

FILED MAR 29 1994
RON GARVIN
CLERK

Fredico Pena, Secretary,
Department of Transportation,
Appellant

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

O R D E R

The Suggestion For Rehearing In Banc of appellee/cross appellant has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: /s/Robert Bonner
Deputy Clerk

Circuit Judge Rogers did not participate in this matter.

United States Court of Appeals
For The District of Columbia Circuit

No. 92-5274

September Term, 1993
USDC CV 77-1342

Francis J. Dashnaw

v.

FILED MAR 29 1994
RON GARVIN
CLERK

Fredico Pena, Secretary,
Department of Transportation,

Appellant

BEFORE: Edwards, and Silberman, Circuit Judges, and Jane A. Restani*, Judge, U.S. Court of International Trade

O R D E R

Upon consideration of the petition for rehearing of appellee cross-appellant filed February 18, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/Robert Bonner
Deputy Clerk

*Sitting by designation pursuant to 28 U.S.C. § 293(a).

APPENDIX G

Selected Parts (less J.A. references) of Brief For Cross-appellant/Appellee

STATEMENT OF CASE

... In 1982, while the case was pending decision, plaintiff was the only victim of an involuntary separation by job abolishment in a reduction in force and applied for discontinued service retirement. He promptly notified the court of this ... while actively looking for another position within or without government ....

This case presents an egregious case of age discrimination by an agency of the federal government. In the April 4, 1988 Memorandum, the District Court entered detailed findings of fact and conclusions of law laying out the pattern and practice of age discrimination against plaintiff. ... . While these underlying findings are not at issue in this appeal, plaintiff

points them out to this Court because they are relevant to his claim of constructive discharge and the relief awarded in this case. It is from this background of flagrant age discrimination that this Court must judge the circumstances of the claim of constructive discharge.

In addition to his own declarations ...; Mr. Dashnaw also submitted other evidence in support of his constructive discharge claim. See declaration of Robert Falls, ...; declarations of plaintiff's supervisor, John Garvey, ...; declaration of Robert W. Schaffran ...

... Where the original claim alleges retaliation a post-charge occurrence alleged to be in furtherance of the prior pattern may be litigated. Waiters v. Parsons, 729 F.2d 233 (3d Cir. 1984). In the instant case, Mr. Dashnaw also alleged retaliation in his administrative com-

plaints. ...

II. There Was Sufficient Evidence of Constructive Discharge and There were Sufficient Findings by the District Court

The September 11, 1989 Memorandum Order of the District Court sets forth at ... a detailed understanding of the law of constructive discharge in this circuit and the facts in this case. ...

... Numerous filings and attachments thereto were made by the parties on relief issues that included constructive discharge issues. The nature and quality of these filings, along with the trial evidence gave the District Court more than sufficient evidence to render a finding. ...

The defendant did not appeal the District Court's finding that he made extensive efforts to correct a perceived age problem by lowering the average age ... The fact that MarAd management favored younger employees and mistreated older

personnel, is evidenced, in part, by the trial testimony ... of Mr. Johnson, a long time EEO Counselor, where he stated:

Q And what was it about that incident that led you to believe that there was age discrimination involved?

A One thing, as I say, this was the influx of the younger people into the Office of Ship Construction, especially in the Division of Naval Architecture, the Region of Ship Design. The older people were rather ridiculed for one thing. Jokes were played on them. Management seemed to go along with those jokes. (J.A. at 67)

The defendant did not rebut or appeal the District Court's finding of continuing pattern and practice of discrimination ... ... The defendant failed to show any legitimate reason for the plaintiff's forced transfer with reduction in rank and loss of duties and possible loss of job or that the plaintiff's articulated reasons were not the true reason. ... The forced transfer action led directly to plaintiff not being allocated any funds for any work

for FY83 and subsequent abolishment of his job.

The defendant did not appeal the District Court's finding that supports the plaintiff's complaint of non-promotion as an exception to the Merit Promotion Program procedures as others were so promoted. Had the plaintiff been promoted, he would not have been in a position to be denied funding support for new work and could not have had his job abolished ... .

The defendant did not appeal the finding of the District Court that "... the defendant did not demonstrate that the failure to select the plaintiff was for legitimate, nondiscriminatory reasons." ... Had the plaintiff been selected for one of the four positions that he applied for under the Vacancy Announcements at issue, he would have had assignments and not have been in the position where his job could

have been abolished.

Thus, Mr. Dashnaw was discharged "under circumstances which give rise to an inference of unlawful discrimination.", See Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1242-43 (8th Cir. 1991).

In arriving at its findings of constructive discharge, the District Court did not even consider Mr. Dashnaw's sworn declaration that he was sitting at his desk with nothing to do and found this to be repugnant. ...

Mr. Dashnaw accepted termination only because the option of remaining at the agency was intolerable under the conditions that existed. The District Court found that he had ample basis for making that decision and that a reasonable person would have also found the working conditions intolerable given the long-standing history of discriminatory denial of promotions and the

circumstances that prevailed after Mr. Dashnaw joined the agency. ...

In this regard, it is relevant that Mr. Dashnaw knew that the agency, the Maritime Administration, was a proven discriminator, found to have engaged in wholesale race discrimination in Harrison v. Lewis, 559 F. Supp. 943 (D.D.C., (1983). Mr. Dashnaw was also aware of another court finding of age discrimination by his agency in the case of Whitcher v. United States Department of Transportation, C.A. 84-1059 (D.D.C. Jan. 24, 1985) (decision by Judge Greene). ...

Mr. Dashnaw never gave up his claim of a right to one of the jobs at issue.

As the District Court found, the constructive discharge flowed from the pattern and practice of failure to promote Mr. Dashnaw as promised when he was first hired. ...

Any ambiguities in the record were properly resolved against the proven discriminator. Trout v. Garrett, 780 F. Supp. 1396 (D.D.C. 1991). ...

... Mr. Dashnaw was ... an outcast. ... In that context, and given the seven years of discrimination he had already endured, his acceptance of an involuntary separation was a constructive discharge. See Godfrey v. Perkin-Elmer Corp., 794 F. Supp. 1179, 1186 (D.N.H. 1992); Calcote v. Texas Educational Fund, Inc., 578 F.2d 95 (5th Cir. 1978). ... The court's decision on the constructive discharge properly depends on "all of the surrounding facts and circumstances" following the reasoning in United States v. Teamsters, 431 U.S. 324, 340 (1977). The trier of facts must consider all the facts, including those presented at trial, which was rightly done in this case.

The trial court's findings on con-

structive discharge are supported by the evidence. ... The defendant's claim that a RIF was necessary is clearly pretextual ..., because the chart exhibit attached to the Charles R. Irby Declaration in ... shows that the funding for operations and training from which salaries are drawn to be actually rising at a significant rate from 1981 through 1984, and the attachment 2 to Mr. Turanin's Declaration attached to ... shows: MAR-900 was over ceiling by one (1) on 5/31/82, one month after the plaintiff was notified of his RIF, and that the only RIF in 1982 was that of the plaintiff, on 6/29/82" and, under ceiling by two (2) three months later on 9/30/82, which supports the contention of plaintiff that the RIF was not necessary ... and the fact that new personnel came on board ... .

The reorganization involved abolishing the Office of R&D and creating two new

offices ...; hence, Mr. Turanin's budget argument regarding the Office of R&D is meaningless especially in view of the fact that a Vacancy Announcement for a promotion for Mr. Schaffran, for which the plaintiff was barred from applying, was issued three days after the plaintiff's departure. ... Mr. Garvey, the plaintiff's supervisor at the time the plaintiff was involuntarily separated, states "1 have read Mr. Dashnaw's Declaration dated September 7, 1986 and have no disagreement with it." ... Further, Mr. Turanin never had any contact with the plaintiff on any matter, including that on any options that the plaintiff might have leading up to and including the discharge of the plaintiff nor did he have or claim to have had any direct knowledge of the plaintiff's job conditions or work experience. ... Many of the statements in Mr. Turanin's affidavits are hearsay.

In the following year (1983), Mr. Falls, at age 65, was the only one RIF'd, (on 10/31/83). He later stated:

"I strongly objected to the abolishment of my position but failed. I was not given the opportunity to take one of several other positions for which I was qualified. I filed a complaint."(..., Falls Decl.).

The District Court concluded that the plaintiff had a "strong case for constructive discharge" ..., and further stated that:

[U]nder these circumstances it is understandable that plaintiff decided to accept termination since a reasonable person would have concluded that all he could have expected was more of the same, and that reasonable person would have concluded that those working conditions were intolerable.

... The District Court's decision is supported by the undisputed facts in evidence including the fact that the plaintiff was exposed to numerous intolerable and humiliating conditions and events, some of a continuing nature, over an extended period of time leading to the

constructive discharge. Some of the events and conditions that are in evidence throughout the record are as follows.

The physical and verbal assaults on the plaintiff in the presence of others were humiliating. The event of a physical and verbal assault by Mr. Pitkin ... . Plaintiff's mistreatment was being described at trial by the plaintiff when he reached an emotional limit and could not complete the description. ... . The plaintiff's statements of that event and related events were not rebutted by the following testimony of Mr. Pitkin. ...

Degrading remarks were made, such as Mr. Pitkin's statement of policy of letting people that he didn't like sit at an empty desk with nothing to do; and, actions such as Mr. Pitkin dropping a dirty penny into plaintiff's cup of coffee and saying "This is what I think of you." ...

Degrading comments and warnings to others to stay away from the plaintiff were made ... . Disparaging remarks such as the one by Mr. Pross on plaintiff's exercising his rights by filing complaints also contributed to the intolerable environment ... The life threatening statement on working over plaintiff with a baseball bat was of a possible continuing threat by Mr. Kenihan, Mr. Pitkin's former assistant, following his being served a subpoena in this case. (... Dashnaw Decl., ... letter to Office of Investigation and Security).

The defendant continued to humiliate the plaintiff by forcing him to be "layered" under younger less experienced nonsupervisory personnel and by not correcting the situation following trial. ... The denial of promotion of the plaintiff continued up to the date he was involuntarily separated in June 1982.

Unlike all other technical personnel, the plaintiff was left to sit at an empty desk with little or nothing to do, being denied assignments or reassignment, which is particularly abhorrent and degrading to a professional and is the ultimate in "loss of rank". ...

A continuing pattern of transferring contractual work that was developed by the plaintiff and it being given to younger, less experienced personnel at higher grade and pay who had little or no R&D experience and credit to others for plaintiff's accomplishments was intolerable. ... . It also seems obvious that the true intent of having the plaintiff develop a draft of a program for King's Point was not to enable giving the plaintiff the promised promotion, that never materialized, but rather for the benefit of Mr. Paraghamian who had the responsibility for that work area. ...

The Machinery R&D program functions to which plaintiff was assigned were transferred at some point to OSC ... "... the development and maintenance of programs focusing on the improvement of ship systems, machinery, equipment, etc.", despite the claim that it was "... one of the oldest and solidly based programs in naval architecture ..." ... .

The plaintiff was discouraged from further professional participation in the Ship Structures Subcommittee panels and Society of Naval Architects Marine Engineers panels and was not provided funds for such participation. ...

The plaintiff concluded that another position was not really offered because of the lack of any specific position identifier such as a job number or job description ... . The plaintiff had no reason to expect any different treatment from the

defendant with respect to a legitimate job offer after his job was abolished than that accorded to Mr. Schindler, also a veteran, which took Mr. Schindler and his attorney three years to undo ... The plaintiff's request for assistance from the Office of Personnel in leaving the organization was unanswered ... .

The fact that MarAd supervision made working conditions intolerable for older employees is evidenced in testimony of: Mr. Johnson, a long time EEO Counselor, at V1 p 92, 100-101; Ms LaPrade at V7, pp. 116-117; Ms King at V8 pp. 7, 16; Mr. Diaz at V8 pp. 34-35. ... . MarAd's flushing older personnel out of the workforce as evidenced by the remarks of the Personnel Director, Mr. Golden ... . The plaintiff had no expectation of any different treatment.

The above events and conditions depict a hostile and intolerable work environment

for the plaintiff. The District Court did not find it necessary to weigh the fact that the plaintiff was forced to sit a his desk with nothing to do. ... . Thus Mr. Dashnaw's working conditions were so intolerable that he had no choice but to accept retirement. See Cockrell v. Boise Cascade Corp., 781 F.2d 173 (10th Cir. 1986).

The Court is also entitled to infer a retaliatory motive from defendant's obvious awareness of plaintiff's four administrative complaint(s), the trial on age discrimination and the agency's subsequent conduct. There is no credible explanation for the defendant's conduct other than age discrimination and/or retaliation. An employer may not discharge an employee for opposing practices made unlawful by the ADEA. See Byers v. Follmer Trucking Co.,763 F.2d 599 (3rd Cir. 1985). As noted in

Harvis v. Roadway Express Inc., 973 F.2d 490, 497 (6th Cir. 1992), cert. granted sub. nom. Rivers v. Roadway Express, Inc., 113 S. Ct. 1250 (1993), it would be pointless to try to determine whether the employer's motive was to retaliate or merely discriminate. Both motives are equally invidious, and the employee suffers the same harm. See Dominic v. Consolidated Edison Co. of New York, Inc., 822 F.2d 1249 (2nd Cir. 1987), at 1251 and 1253.

III. The District Court Properly Resolved The Constructive Discharge Issue Based on the Record

... In summary, the District Court gave full and fair consideration to the agency's submissions on the issue of constructive discharge in view of the Court's findings of age discrimination. The only conclusion to be drawn from the evidence at trial and subsequent inquiry was that Mr. Dashnaw's termination was a constructive discharge

based upon working conditions and the proven pattern and practice of age discrimination which any reasonable person would have found to be intolerable. Therefore, the constructive discharge finding was appropriate from the evidence before the District Court. ...

Since the District Court's finding of constructive discharge is not clearly erroneous, Mr. Dashnaw must prevail on that issue. Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992) (collecting cases). ...

V. The District Court Erred in Retroactively Promoting Plaintiff Only to the GS-15 Level Where Two of the Four Selectees were Further Promoted

It is undisputed that at least two of the four selectees for the four positions that the agency was found to have discriminated against plaintiff eventually went on to become grade 16s. See exhibit 6 to

plaintiff's reply memorandum, June 14, 1988 .. . Under these circumstances, plaintiff should have been retroactively promoted to grade 16 when the first chosen selectee (Mr. Pross) was promoted to that level. The District Court did not grant plaintiff's requested tracking of the promotion history and other benefits of the first chosen selectee, Mr. Pross, stating that whether the plaintiff would have been promoted to a Grade 16 is subject to speculation. ...

Mr. Dashnaw submits that it was not speculative because the position for which Mr. Pross was selected was a position that was properly classified as a 16 but was being "under filled." ... . Mr. Pross was promoted to GS-16 without competition on August 14, 1977 as Mr. Dashnaw would have been in the position. Mr. Hammer, another selectee, was promoted to GS-16 as of January 20, 1985. ... Mr. Dashnaw also

presented ample evidence at trial that others were promoted to GS-16 on a non-competitive basis as exceptions to the merit promotion program up to the date of the plaintiff's last administrative complaint. ... The District Court so found in its merit decision. ...

Reinstatement should be based on the results of tracking the promotion history and other benefits given to the chosen selectee to place the plaintiff in his rightful place. See Spagnuolo v. Whirlpool Corp., 717 F.2d 115 11?-21 (4th Cir. 1983). See also Koyen v. Consolidated Edison, Co., 560 F. Supp. 1161 (S.D.N.Y. 1983). This is consistent with the make whole relief concept established long ago by the Supreme Court in Albermarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975). See Dickerson v. Deluxe Check Printers, Inc., supra, at 280.

In denying Mr. Dashnaw this relief,

the District Court relied upon the Turanin declaration, paragraph 6, claiming that promotion at this level had to be approved by the Office of Personnel Management, formerly the Civil Service Commission, and the Maritime Administration order No. 790-920 on the Maritime Administration Executive Resources Board ... . The administrative order that the defendant offered to justify his argument that the plaintiff would not have been promoted to a GS16 is dated 11/21/86, which is over ten years after the date that Mr. Pross was promoted, the date the plaintiff would have been promoted to a GS-16, and has no probative value.

Given the outstanding qualifications of Mr. Dashnaw and the absence of evidence that Mr. Pross had higher qualifications, Mr. Dashnaw submits that his make whole relief should have included the tracking of

the promotion history of Mr. Pross and his replacement(s), if any, in the positions that Mr. Pross held. The District Court found in its April 4, 1988 memorandum that plaintiff had very high qualifications. ... Therefore, it was an error for the District Court to find that his promotion to a position that was classified at the 16 level was speculative.

APPENDIX H

Selected Parts of Reply Brief For Cross-Appellant/Appellee

... The recognized fact that retaliatory conduct could grow out the plaintiff's four complaints is supported in his second administrative complaint where he claimed that:

> "Further, my non-selection for the two above cited Vacancy Announcements was a retaliation for my filing of a prior EEO complaint and my other efforts to gain consideration for promotion without regard to age, ..." (J.A. 136 (Page 2 of Plaintiff's Second Complaint, April 8, 1976, Plaintiff's Trial Exhibit 119)).

The plaintiff alleged preselection ..., a pattern of continuing discrimination, nonpromotion, and that he was placed in a vulnerable position with potential loss of job and his work assignments eroded, ...

These claims were proven at trial and which led up to his constructive discharge, after trial. The constructive discharge of the plaintiff clearly grew out of the

proven continuing discriminatory pattern, practice and policy of the defendant ... and probable retaliatory motive and the mistreatment of the plaintiff and the intolerability of conditions. ...

II. There Was Sufficient Evidence Of Constructive Discharge And There Were Sufficient Findings By The District Court

... The proven fact that the plaintiff was not promoted because of discriminatory reasons, and probably retaliatory reasons, does not stand alone in the District Court's finding of constructive discharge and was considered along with the other factors that rendered the working conditions intolerable. It cannot be assumed away that the District Court did not consider all, or at least most, of the evidence including that described in the Brief For Cross-Appellant/Appellee ..., among other possible evidence in the record. The totality of the evidence

clearly depicts intolerable working conditions. ...

The fact that the plaintiff was being denied work just before his discharge is highly significant. There is no material difference between taking work away from the plaintiff and giving it to younger employees and not giving plaintiff any new funding or assignments while giving assignments to all others. Plaintiff is equally harmed either way. ...

It is clear that if the plaintiff did not sign the RIF papers, he would surely have remained at an empty desk with nothing to do which would be intolerable and humiliating for a professional such as the plaintiff in an environment that can only be described as intolerable and filled with apprehension based on previous and continuing incidents of abuse. The defendant could have either reassigned the plaintiff to

another position or assign him new work but did neither. It is clear that the defendant had no intention of giving the plaintiff Mr. Schaffran's position or any other position ... .

The job offered to the plaintiff was not a real, identifiable job as the record clearly shows the lack of any job identifiers including that position held by Mr. Schaffran. Further, the contention of the defendant ... that "Mr. Schaffran's position description included supervisory duties and other high level attributes that plaintiff had claimed he wanted all along." is entirely incorrect and misleading. A comparison of the plaintiff's Position Description with that of Mr. Schaffran's, ... shows no such distinction between them.

No deference should be given to Mr. Levine's Declaration ... in light of the fact that Mr. Levine: (i) had no direct

knowledge of the circumstances of the plaintiff's job situation at the time of plaintiff's discharge because he was assigned to another office; and, (ii) was one of the six preselected hires by Mr. Pitkin, who was one of the alleged discriminatory officials, from Mr. Pitkin's former company, and as such he has a vested interest in protecting Mr. Pitkin's actions ... and, (iii) he was on the defendant's witness list and his name was mentioned at trial nearly one-hundred times, which was more than most witnesses, with respect to relevant issues but he was not called to testify. The District Court stated that: "It is significant that the defendant did not use the testimony of the plaintiff's immediate supervisor, Z. Levine, or any program manager who was on the witness list, ..." ...

Mr. Turanin had no contact with either

the plaintiff on any matter or the plaintiff's Office Director on this issue, ... Further, Mr. Turanin was not a witness at trial nor on the witness list and had no knowledge of the working conditions of the plaintiff, nor does he claim to have such knowledge.

It is questionable that the declarations of Levine and Turanin comply with Federal Rule of Civil Procedure 56(e) that they be based on personal knowledge, and set forth such fact as would be admissible in evidence, and show affirmatively that affiant is competent to testify about those facts. See Sanders v. Culinary Workers Union Local No. 226, 783 F.Supp. 531, at 536 D.Nev. 1992) citing Box v. A.& P. Tea Co., 772 F.2d 1372, 1378 (7th Cir. 1985).

The fact that Mr. Golden, one of the alleged discriminatory officials in the instant case, as the Director of Personnel,

had a knowing and continuous disregard of the regulations is evidenced, in part, by the testimony of Mr. Schindler, a Personnel Office Representative, ... Such disregard of regulations helps enable discriminatory personnel actions. ...

The defendant did not appeal the District Court's finding that "The evidence in this case is clear that the agency did not utilize a fair system for the consideration of applicants for promotions or applicants for positions within the agency." ... . The manipulation of the Merit Promotion Program and other regulations is necessary to both age discrimination in promotions and the "flushing out" of older personnel by constructive discharge or other means. ... .

It follows that the agency would not use a fair system for assignments and reassignments which would have contributed

to the constructive discharge of the plaintiff. While younger personnel were being promoted, older personnel were also being downgraded in rank such as Mr. Black ... or being denied a reduced grade position in lieu of forced retirement in the case of Mr. Crook, plaintiff's former supervisor ... .

The defendant was still engaged in preselection practices at least up to the date of trial and denied the plaintiff a fair opportunity to compete for other positions. ...

Thus, Mr. Dashnaw's working conditions rose to the requisite level of intolerableness since they would lead a reasonable person to resign. Hopkins v. Price Waterhouse, 825 F.2d 458, 472 (D.C. Cir. 1987), rev'd in part on other grounds, 490 U.S. 228 (1989). Proof of constructive discharge does not require evidence that the

employer intended to force the employee to quit. Id. Nor is there any requirement that an employee remain in an intolerable work place for a particular period of time. Atlantic Richfield Co. v. District of Columbia Commission on Human Rights, 515 A.2d 1095, 1101 (D.C. 1986) (collecting cases).

Whether working conditions are so intolerable that a reasonable person is forced to resign, as plaintiff asserted here, is a question for the trier of fact. E.g., Simpson v. Federal Mine Safety & Health Review Commission, 842 F.2d 453, 463 (1988). However case law demonstrates that "intolerable conditions" commonly, though not invariably, fall into two broad categories. The first involves working conditions in which the employee is subjected to "a continuous barrage of derogatory comments ... appearance, behavior, and moral-

ity." Atlantic Richfield, supra, 515 A.2d at 1101.[1] the second involves working conditions in which the employee "reasonably expected ... opportunities for advancement," but the employer's discriminatory actions or omissions "essentially locked [her] into a position from which she could apparently obtain no relief." Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir. 1981). See Hopkins, supra, 825 F.2d at 472-473 (finding a constructive discharge where the denial of a promotion was reasonably viewed as "a career-ending action").

> "[I]ntolerableness of working conditions is very much a function of the reasonable expectations of the employee, including expectations of promotion or advancement." Hopkins, supra, 825 F.2d at 472.

Thus, while a discriminatory failure to promote, without more, is insufficient to establish a constructive discharge, see id. at 825 F.2d at 473; Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir.

1982), it may be the basis or a finding of constructive discharge if the employee can show that he "reasonably expected ... opportunities for advancement" and that the employer's discriminatory actions or omissions "essentially locked [him] into a position from which he could apparently obtain no relief." Clark, supra, 665 F.2d at 1174. In Hopkins the court held that the employer's discriminatory failure to promote the plaintiff could be reasonably viewed by a person in her position as "a career-ending action," and that the failure

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1 See also, e.g., Goss v. Exxon Office Systems Co., 747 F.2d 885, 888-889 (3d Cir. 1984); (supervisor asked female plaintiff about her family plans, expressed doubt about her ability to combine a career and motherhood, was verbally abusive, and transferred her to less desirable sales territory); Held v. Gulf Oil Co., 684 F.2d 427, 429 (6th Cir. 1982) (female plaintiff was given "the least desirable job," was "constantly subjected to offensive sex-based innuendos," and, unlike her male counterparts, was required to work extremely long hours, unstop clogged toilets, and complete "volumes" of paperwork).

to promote her, given other indicia of discriminatory animus, therefore "amounted to a constructive discharge." Hopkins, supra, 825 F.2d at 473. The same is true here for Mr. Dashnaw. ...

V. The District Court Erred In Retroactively Promoting Plaintiff Only To The GS-15 Level

The District Court found the defendant guilty of age discrimination in the selection of Mr. Pross over the plaintiff ... The defendant argues that despite the proven discriminatory practices the plaintiff should not be allowed to track the promotion history of Mr. Pross. To further bolster his claim, the defendant offers the clearly proven false and pretextual statements that the "plaintiff's background was in the narrow area of metallurgy ..." The broad and intensive background of the plaintiff is evident in the record. ... The lack of any costing experience of Mr. Pross

is revealed in ... . To place the defendant's contentions in better context, see ... . Further, the District Court did not indicate any reliance on such statements.

The court ordered reinstatement should be based on the results of "tracking" the promotion history and other benefits given to the chosen selectee to place the plaintiff in his rightful place. The Supreme Court in Franks v. Bowman Transport Co., Inc., 424 U.S. 747,762 (1976) stated:

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination, on the sole ground that such relief diminishes the expectations of other, arguably innocent employees, would, if applied, generally frustrate the central "make-whole" objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis their status in the hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, ...

In favoring the granting of "benefit-type" seniority, the Supreme Court relied on Albermarle paper Company v. Moody, 422 U.S. 405, 418-19 (1975), in stating that "adequate relief for a victim of discrimination ordinarily will require 'slotting' the victim in that position in the seniority system that would have been his had he been hired at the time of his application." Franks, 422 U.S. at 765, 96 S.Ct. at 1265. And, from Franks, supra, at 1271:

> [D]istrict courts should take as their starting point the presumption in favor of rightful place seniority relief and proceed with further analysis from that point:, and that such relief may not be denied on the abstract basis of adverse impact upon interest of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.[Emphasis in original]

Similarly, decisions construing the remedial section of the National Labor relations Act, § 10(c),29 U.S.C. § 160(c), the model for § 706(g), 42 U.S.C. § 2002-

5(g), make clear that the task of the National Labor Relations Board is "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." See United Brotherhood of Carpenters & Joiners of America v. NLRB, 365 U.S. 651, 657 (1961) (Harlan, J., concurring). With regard to the extent to which an employee who has been discriminated against and who has already been reinstated must be made otherwise whole, the court in Franks, 422 U.S. at 764, 96 S.Ct. at 1264, found that courts have wide discretion in exercising their equitable powers to fashion the most complete relief possible.

The overarching goal in fashioning relief is to place injured party, as nearly as possible in the position the party would have occupied absent illegal discrimination. See Fleming v. Ayers Associates,

948 F.2d, at 994 (6th Cir. 1991). The court has broad discretion in selecting remedies as long as relief granted is consistent with purposes of ADEA. See Castle v. Sangamo Weston, Inc., 837 F.2d at 1561 (11th Cir. 1988). If District Court refuses to grant equitable relief, it must carefully articulate its rationale. Id, at 1563. That was not done here. ...

In Ross v. Buckeye Cellulose Corp., 764 F. Supp., 1543, 1544 (M.D.Ga. 1991), ... The court further remarked that:

> In awarding damages to employees, as prevailing plaintiffs in employment discrimination action, district court must attempt to place each employee in position he or she would have been in absent employer's discriminatory practice; ...

See also, Gunby v. Pennsylvania Elec. Co., 840 F.2d, 108 1123 (3rd Cir. 1988); ...

(2)

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No. 93-2073

In the Supreme Court of the United States

OCTOBER TERM, 1994

FRANCIS J. DASHNAW, PETITIONER

v.

FEDERICO PEÑA, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in refusing, for purposes of calculating a backpay award, to assume that petitioner would have been promoted to a GS-16 position.

2. Whether the court of appeals erred in concluding that there was insufficient evidence in the record to support petitioner's claim of constructive discharge.

3. Whether the court of appeals, having concluded that petitioner was not constructively discharged, erred in failing to consider whether the motive for the alleged constructive discharge was retaliation.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a8) is reported at 12 F.3d 1112. The opinion (Pet. App. 9a-74a) and orders of the district court (Pet. App. 75a-87a, 88a-91a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1994. A petition for rehearing was denied on March 29, 1994. Pet. App. 106a, 107a. The petition for a writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was hired by the Federal Maritime Administration (MARAD) in 1967 as a GS-14 engineer. Pet. App. a3. In 1977, petitioner filed a complaint in district court alleging employment discrimination on the basis of age, national origin, religion and race. By the time of trial, petitioner's only allegation was that he had been discriminated against on the basis of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a. His main allegation was that he had been denied promotions to GS-15 positions that went instead to younger candidates. Pet. App. a3.

The district court conducted a bench trial from April 21, 1980, through May 1, 1980. Pet. App. a3. In July, 1982, before any judgment had been issued, petitioner filed a document entitled "Notice of Change in Plaintiff's Employment Status," which stated as follows:

> [Petitioner] hereby notifies the Court that the position held by [petitioner] at the Maritime Administration was abolished in April, 1982, under reduction in force (RIF) procedure. [Petitioner] declined another job offer, resigned and has applied for discontinued service retirement. He is currently unemployed. Since this matter was tried in April, 1980, and has been pending decision since June of 1980, [petitioner] respectfully requests that the Court expedite decision in this matter and render a decision within the next thirty (30) days.

Id. at a3-a4. Over the next three years, petitioner filed four additional requests for expedited consideration and two motions for status calls. *Id.* at a4. These motions did not allege that petitioner had been constructively discharged, nor did they mention the circumstances of

his retirement. *Ibid.* Petitioner never amended his complaint to include an allegation of constructive discharge.

In July, 1985, the district court ordered that petitioner be promoted to the GS-15 level, retroactive to an unspecified date, and that he receive backpay. Pet. App. a4. The memorandum opinion accompanying the order did not address petitioner's 1982 retirement. Respondent moved to amend the judgment on the ground that the opinion referred to materials not admitted into evidence. *Ibid.* The trial court granted the motion in June, 1986, vacating the July, 1985, judgment. *Ibid.*

On August 19, 1986, petitioner filed a two-page motion again requesting expedited consideration of his case. This motion did not use the words "constructive discharge," but did state that "[petitioner] submits that his retirement in the face of being offered a position with no description or duties was in effect involuntary and would not have occurred if he had not been discriminated against with respect to promotions in the 1970s." Pet. App. a4.

In April, 1988, the district court issued an opinion finding that petitioner had been discriminated against on the basis of his age on four occasions on which he was denied promotions. Pet. App. 9a-74a. The district court's findings made no reference to any constructive discharge, and the opinion did not include an order. The district court invited petitioner to propose a remedial order. *Id.* at 74a. Petitioner recommended that he be reinstated with backpay from 1982. *Id.* at a5. Both sides then filed affidavits and exhibits concerning the circumstances of petitioner's departure from MARAD. *Ibid.*

On September 11, 1989, the district court issued a memorandum order finding that petitioner was entitled to a retroactive promotion to the GS-15 level, effective

two years before the date on which he filed his first administrative complaint. Pet. App. a5, 77a. The memorandum also upheld petitioner's constructive discharge claim, rejecting respondent's contention that, when it eliminated petitioner's job in 1982, it offered petitioner an alternative job from which he was likely to attain the promotion to GS-15 that he had long sought. *Id.* at a5, 81a-82a. The district court found that petitioner was constructively discharged because a "reasonable person would have concluded that those working conditions were intolerable." *Id.* at 83a.

On May 11, 1992, the district court issued an order directing that petitioner be retroactively promoted to the GS-15 level, and that he receive backpay from 1975 through the date of the order, subject to appropriate mitigation as determined by the parties' subsequent discovery. Pet. App. a5, 89a-91a. Because the court found that petitioner had been constructively discharged in 1982, its backpay award included the years after petitioner left MARAD's employ. *Id.* at a5.

2. Respondent appealed, challenging only the district court's ruling that petitioner was constructively discharged in 1982. Petitioner cross-appealed, arguing that he should have been promoted to the GS-16 level rather than GS-15. The court of appeals reversed the district court's finding of constructive discharge, affirmed the judgment in all other respects, and remanded the case to the district court for calculation of the amount owed petitioner. Pet. App. a8.

The court of appeals observed that the "law of the circuit makes clear that, in order to find a constructive discharge in a case involving a claim of discrimination, a District Court must find not only intentional discrimination, but also 'aggravating factors.'" Pet. App. a7. The court noted that "the District Court found no

aggravating factors at all, but simply relied on its finding that MARAD had discriminatorily failed to promote [petitioner] as support for its conclusion that the agency had made [petitioner's] working conditions 'intolerable.'" *Ibid.* The court then concluded that the district court's findings "plainly cannot support a conclusion that [petitioner] was constructively discharged" and, further, that "the record is insufficient to support a constructive discharge claim." *Ibid.* Accordingly, the court held that petitioner "is not entitled to reinstatement or to backpay for the period following his departure from MARAD." *Ibid.*

The court then rejected petitioner's argument that the district court should have calculated the backpay award assuming that petitioner would have been promoted to a GS-16 position. Noting that the district court had found that petitioner's promotion to GS-16 was "subject to speculation," the appellate court concluded that "[n]othing in the record persuades us that this finding is clearly erroneous, and we accordingly uphold it." Pet. App. a7.

ARGUMENT

1. Petitioner renews his argument (Pet. 23-24) that the district court erred in refusing to order his promotion to the GS-16 level. That contention is without merit. The district court, "[a]fter giving careful consideration" to petitioner's assertions, found that "[w]hether [petitioner] would have been promoted to a Grade 16 is subject to speculation," because any promotion to GS-16 would have required the approval of the Office of Personnel Management. Pet. App. 84a. The court of appeals affirmed this finding as not clearly erroneous. *Id.* at a7. This Court ordinarily will not reverse factual findings concurred in by both lower

courts, see *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Mfg.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), and petitioner offers no reason for the Court to depart from that practice in this case.

Petitioner contends (Pet. 24) that the decision below conflicts with *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). In *Franks* and *Albemarle*, the Court emphasized that one of the central purposes of Title VII of the Civil Rights Act of 1964 (on which some of the remedial provisions of the ADEA are modeled) is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Franks*, 424 U.S. at 763; *Albemarle*, 422 U.S. at 418. In neither case, however, did the Court state that Title VII requires an employment-discrimination plaintiff to be placed in a better position than he or she would have been in, had the discrimination not occurred. Here, the district court awarded backpay as a result of its finding that petitioner would have been promoted from GS-14 to GS-15 but for the age discrimination, but it declined to assume a further promotion to a GS-16, finding such a promotion speculative. That finding was based on the facts and circumstances of this particular case and is consistent with *Albemarle* and *Franks*.

2. Petitioner argues (Pet. 25-43) that, in analyzing his constructive discharge claim, the court of appeals erred by requiring him to show that "aggravating factors" compelled him to resign, and that there is a conflict among the circuits on this issue. There is, however, no conflict among the courts of appeals; five other circuits have expressly agreed with the D.C. Circuit's decision below that, to prevail on a claim of constructive discharge, an employment-discrimination plaintiff must show "aggravating factors" beyond the fact of discrim-

ination itself.[1] Moreover, every circuit has adopted essentially the same test for constructive discharge claims, which requires plaintiffs to show that their working conditions were so bad that a reasonable person in the employee's shoes would have felt compelled to resign.[2] While the courts of appeals may have used different terms, such as "intolerable," "unpleasant," or

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[1] See *Pittman* v. *Hattiesburg Mun. Separate School Dist.*, 644 F.2d 1071, 1077 (5th Cir. 1981) (Title VII); *Yates* v. *Avco Corp.*, 819 F.2d 630, 636-637 (6th Cir. 1987) (Title VII); *Darnell* v. *Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994) (ADEA); *Nolan* v. *Cleland*, 686 F.2d 806, 813 (9th Cir. 1982) (Title VII); *James* v. *Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994) (ADEA). While the Third Circuit has disapproved the suggestion that "constructive discharge *necessarily* requires evidence of aggravating circumstances" beyond an incident of discrimination, see *Schafer* v. *Board of Public Education*, 903 F.2d 243, 250 (1990) (emphasis added), under the reasoning that even one incident of discrimination could be so intolerable as to compel a reasonable person to quit, it, like every other circuit, has required constructive discharge plaintiffs to show that working conditions were so bad as to compel a reasonable person to resign. *Ibid.* As far as we are aware, no circuit has interpreted the "aggravating circumstances" requirement to involve more than that.

[2] *Aviles-Martinez* v. *Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (42 U.S.C. 1983); *Stetson* v. *NYNEX Serv. Co.*, 995 F.2d 355, 361 (2d Cir. 1993) (ADEA); *Clowes* v. *Allegheny Valley Hosp.*, 991 F.2d 1159, 1161 (3d Cir.) (ADEA), cert. denied, 114 S. Ct. 441 (1993); *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) (ADEA), cert. denied, 475 U.S. 1082 (1986); *McKethan* v. *Texas Farm Bureau*, 996 F.2d 734 (5th Cir. 1993) (ADEA), cert. denied, 114 S. Ct. 694 (1994); *Yates* v. *Avco Corp.*, 819 F.2d at 636-637; *Darnell* v. *Target Stores*, 16 F.3d at 177; *Hukkanen* v. *International Union of Operating Eng'rs*, 3 F.3d 281, 284 (8th Cir. 1993) (Title VII); *Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994) (Title VII); *James* v. *Sears, Roebuck & Co.*, 21 F.3d at 992; *Wilson* v. *S & L Acquisition Co.*, 940 F.2d 1429, 1436 (11th Cir. 1991) (ADEA).

"aggravating," to describe how bad the working conditions must be for a finding of constructive discharge, they all undertake the same inquiry and require essentially the same showing.[3] This unanimous view is consistent with the policy of federal fair-employment laws that, where possible, claims of unlawful discrimination should be addressed within the context of ongoing employment relationships. See *Bourque* v. *Powell Elec. Mfg.*, 617 F.2d 61, 66 (5th Cir. 1980). A civil rights plaintiff must, therefore, "mitigate damages by remaining on the job" unless that job presents "such an aggravated situation that a reasonable employee would be forced to resign." *Ibid.*

3. Finally, petitioner argues (Pet. 43-46) that the court of appeals erred in failing to consider whether respondent's motive for the constructive discharge was retaliation. The court of appeals did not need to address this issue, however, because it found that there had not been a constructive discharge. The crucial question in petitioner's constructive discharge claim was whether a reasonable person in petitioner's position would have felt compelled to quit because of intolerable working conditions. The court of appeals answered that question in

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[3] The Fourth Circuit may have adopted an anomalous (and stricter) requirement that, in constructive discharge cases, the plaintiff must also show that the employer created the working conditions with the intent to force the plaintiff's resignation. See *Bristow*, 770 F.2d at 1255. In *Johnson* v. *Shalala*, 991 F.2d 126 (4th Cir. 1993), cert. denied, No. 93-248 (Oct. 3, 1994), which involved a constructive discharge claim under the Rehabilitation Act, 29 U.S.C. 701 *et seq.*, the petitioner challenged the Fourth Circuit's intent requirement. This case does not present that question, for the court of appeals did not require petitioner to show that respondent intended to force him to quit.

the negative, and the retaliatory motive issue thus became irrelevant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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